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In The

Supreme Court of the United States

CITY OF WESTMINSTER, CHARLES V. SMITH, CRAIG SCHWEISINGER, TONY LAM, DON S. ANDERSON, JOHN T. DEMONACO, BRIAN MAYHEW, ROBERT HUNTLEY, CHARMAYNE BOHMAN AND RICHARD JONES,

Petitioners,

v.

DON HERR, JOE WILSON and MICHAEL GARRISON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the context of a chain of decision-making regarding the discipline of a public employee, does the mixed motive rule of causation established in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) ("*Mt. Healthy*") bar the award of damages to an employee alleging violation of his First Amendment rights, when the final decision-maker, after independent review, imposed discipline for legitimate reasons, but the supervisor who initiated the process would not have done so but for the employee's protected activity?

2. Are officials who must determine whether they can lawfully discipline an employee for speech entitled to qualified immunity from suit for First Amendment violation, in light of the multifactor balancing test that must be employed to determine whether particular speech is protected?

3. Does a favorable liability verdict on a First Amendment claim of conspiracy to retaliate by imposing discipline permit a plaintiff to recover emotional distress damages flowing from acts other than discipline, as to which there were no findings, including acts for which officials would ordinarily be absolutely immune?

LIST OF PARTIES

The parties to the proceeding below were the petitioners City of Westminster, Charles V. Smith, Craig Schweisinger, Tony Lam, Don S. Anderson, John T. Demonaco, Brian Mayhew, Robert Huntley, Charmayne Bohman, and Richard Jones, respondents Don Herr, Joe Wilson, and Michael Garrison, plaintiffs Paul Gilbrook, Hal Raphael, and Dana Bowler, and intervenor Alan Davis, former counsel for plaintiffs.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of Westminster, Charles V. Smith, Craig Schweisinger, Tony Lam, Don S. Anderson, John T. Demonaco, Brian Mayhew, Robert Huntley, Charmayne Bohman, and Richard Jones respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The original opinion of the Court of Appeals for the Ninth Circuit is reported at 177 F.3d 839. The opinion was amended (at 1999 WL 496486) and the amended opinion is reprinted in the Appendix at pages 1-79, *infra*. The order of the United States District Court for the Central District of California on petitioners' motions for judgment and new trial is unreported and is reprinted in the Appendix at pages 80-124, *infra*. The judgment is reprinted in the Appendix at pages 125-128, *infra*.

JURISDICTION

On May 21, 1999, the Ninth Circuit rendered its decision. On July 15, 1999, the Ninth Circuit denied a timely petition for rehearing and rehearing en banc and issued an amended opinion. App. at 3-4, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in relevant part,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(R.S. § 1979; Publ.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

Amendment I to the Constitution of the United States provides,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. SUMMARY OF RELEVANT UNDERLYING FACTS.

(1) The Conflict Between The City Of Westminster And The Fire Department.

This case arose in the context of a budget battle between the City of Westminster and its fire department. Efforts on the part of the City to control costs included

reorganizing the fire department in July 1993 to remove a truck from service, and retaining KMPG Peat Marwick to review overtime practices in various City departments. The Peat Marwick review came to focus on the fire department when its initial report revealed overtime expenses in the fire department were well in excess of those incurred by other departments. The review expanded to include the issue of compliance with a City policy that required employees to file personnel transaction forms ("PTF's") when taking paid leaves. When a PTF was filed, hours were deducted from the employee's leave bank. The hours in the leave bank had monetary value that employees could cash out at certain times of the year, so unreported PTF's created a loss for the City.

In April 1994, Peat Marwick reported more than 1,400 instances of missing PTF's involving 9,500 hours eligible for cashing out by fire department employees. The City asked the Orange County District Attorney's office to investigate whether any criminal conduct had occurred in the fire department with respect to overtime practices and PTF's. In April 1994, the District Attorney concluded there was insufficient evidence to prove a crime had been committed.

Shortly before trial commenced in July 1995, the City contracted for fire services with the Orange County Fire Authority, thereby eliminating the fire department and saving the City between $1.6 million and $1.8 million annually.

The firefighters' union, the Westminster Fire Fighters Association, had been politically active in City Council elections since 1977, endorsing candidates and running

their campaigns. The union opposed the July 1993 reorganization of the fire department, and union members collected signatures on a non-binding petition protesting it. Beginning in August 1993, the union led an unsuccessful effort to recall petitioners Charles V. Smith, who was mayor, and councilpersons Craig Schweisinger, Tony Lam, and Charmayne Bohman, all of whom had voted for reorganization.

In January 1994, hours after a fire in which an individual died, Michael Garrison, the union's political advocate, issued a press release on its behalf, which stated, "This tragedy is the direct result of the Mayor and Council placing politics above the safety of the people." The investigation as to time and cause of death had not been completed. Garrison testified that, in his opinion, the investigation was unimportant; Gilbrook, the union's president, testified he would not have wanted to know about the investigation before the statement was made, and the union conducted no investigation; Raphael testified he was "glad" they got the information to the public before the investigation was completed. In 1992, Garrison had run the campaign office of Mayor Smith's opponent.

(2) The Discipline Of Herr And Wilson.

Respondent Don Herr was a battalion chief who was acting chief of the fire department between May 1992 and August 1993. In April 1994, the new chief, petitioner John Demonaco recommended that Herr be terminated for gross negligence in permitting Paul Gilbrook to drive a fire truck on a suspended license, for failing to supervise personnel under his command with respect to PTF's, and

for failing to comply with PTF policy on six occasions. At trial, Gilbrook admitted that he had worked during the suspension period. Herr conceded Gilbrook might well have driven during the suspension period but denied that he had knowingly permitted Gilbrook to do so or that he was part of a coverup of the fact.

Demonaco also recommended Wilson's termination for failing to file PTF's for 696 hours, as reflected in the Peat Marwick report. Wilson conceded PTF's were to be filed for leaves other than sick leave but disputed that he had failed to file his, noting that two of his PTF's had been misfiled by the City. After hearings, the assistant city manager, petitioner Don Anderson, upheld the recommendations to terminate Herr and Wilson.

The next and final level of review was before petitioner Robert Huntley. Huntley had the power to sustain, modify, or reject the proposed discipline. Huntley upheld the termination of Herr but reduced Wilson's discipline to demotion, after reviewing documentary evidence over the course of many days, including the Peat Marwick report, and conducting hearings in which he heard argument by counsel and gave every individual the opportunity to speak. He testified, among other things, that he did not believe Herr on the issue of Gilbrook's driving on a suspended licence and found letting him drive was at least negligent if not intentional. As to the failure to file PTF's, he testified it was a violation of City rules; he reduced Wilson's discipline because he found him less culpable than other employees. He further testified that no one influenced his decisions on discipline.

(3) The Discipline Of Michael Garrison.

Garrison was fired for issuing the press release blaming the City Council and Mayor for the death by fire. According to his termination notice, the press release went "beyond appropriate 'public comment' and constitutional protections. . . . " At trial, Demonaco testified about the City's concerns that Garrison's press release, implicating his superiors in a death, had exposed the City to a potential lawsuit that would cost taxpayers "a great deal of money." He also testified about the undermining of public confidence and of the already low morale of the firefighters who might back away from a job in fear for their safety and doubts about their leaders.

B. THE INITIATION OF THE LAWSUIT.

In March 1994, Paul Gilbrook, who had been terminated for PTF violations and driving on a suspended license, respondent Garrison, and the Westminster Fire Fighters Association sued petitioners, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1367(a). They alleged claims pursuant to 42 U.S.C. § 1983 and California law regarding slander. Gilbrook and Garrison alleged, among other things, that their First Amendment rights had been violated because they had been terminated for opposing the City's efforts to control the fire department's budget. In September 1994, respondents Don Herr and Joe Wilson joined the action upon the filing of a first amended complaint.

C. SUBSEQUENT PROCEEDINGS.

1. The Trial.

In July 1995, the claims of Herr, Wilson, and Garrison, as well as those of Paul Gilbrook, his battalion chief, Hal Raphael, and another firefighter, Dana Bowler, went to trial against the individual defendants. Liability, damages, and punitive damages were tried to a jury in separate phases of the trial; the City's liability was subsequently determined by the district court.

At the close of plaintiffs' evidence in the liability phase of the trial, petitioners moved for judgment pursuant to Federal Rule of Civil Procedure 50(a). Among other things, they argued that absolute immunity precluded any claims based on conduct such as the reorganization of the fire department and the investigations by Peat Marwick and the District Attorney. The district court concluded that such events were not in themselves the basis of actionable claims and that the focus should be on discipline. (Appellants' Excerpts of Record at 326-327, 364.)

The district court also granted petitioners' motion on Garrison's civil rights claims. As to his First Amendment claim, the court found the press release was not protected, and that if it were, the individual defendants were entitled to qualified immunity. The district court reasoned, "This statement . . . just wasn't a statement that the city council in reorganizing the fire department is providing inadequate fire service protection. The statement here was far more specific. 'You caused, City Council, in your action the death of this fellow.' " (Cross-Appellants' Supplement Excerpts of Record ("SER") at

276.) The district court concurred with the City's position that the press release had exposed it to a potential lawsuit, stating of the press release, "If that is not pinning liability on the city, I don't know what is." (SER at 277.)

The remaining First Amendment claims went to the jury. The jury was asked to determine whether Demonaco, Anderson, and Huntley had imposed discipline on the remaining plaintiffs in retaliation for conduct protected by the First Amendment and which, if any, of the petitioners conspired to impose discipline in retaliation for protected conduct. The only plaintiffs to prevail on First Amendment claims were Herr, Wilson, and Bowler.[1] The jury found that Demonaco, who had recommended discipline, and Anderson, who had accepted his recommendations, would not have done so but for Herr and Wilson's political activities. However, the jury exonerated Huntley, the final decision-maker, finding that protected conduct was not a substantial factor in his decision to fire Herr and demote Wilson and that he was not part of a conspiracy to retaliate through discipline.

During the damages phase of the trial, over objection, plaintiffs were permitted to testify about emotional distress allegedly caused by conduct and occurrences *other than* discipline, such as the reorganization of the fire department, the Peat Marwick investigation, and the transfer of fire services to Orange County.

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[1] The district court subsequently ordered a new trial for Bowler. The Ninth Circuit reversed, directing judgment be entered in favor of petitioners on Bowler's claims.

2. Post-Trial Motions.

Petitioners moved for judgment as a matter of law and for a new trial. They argued, among other things, that the exoneration of Huntley meant that Herr and Wilson were not fired for First Amendment activity but for legitimate reasons, and so, under *Mt. Healthy*, there was no causation. They also argued it was error to admit evidence of emotional distress derived from conduct other than discipline. The district court rejected the arguments and denied those portions of the motion.

3. The Appeals.

Appeals, including a cross-appeal by Garrison, followed petitioners' post-trial motions. The Ninth Circuit affirmed judgment in favor of Herr and Wilson. It rejected petitioners' argument that *Mt. Healthy* barred recovery. It reasoned that Huntley would never have considered discipline but for the retaliatory motives that set the process in motion: "[T]he jury must have concluded that Huntley would not have disciplined Herr, [or] Wilson, . . . if Demonaco and Anderson had not brought charges against those plaintiffs in the first place." App. at 24, *infra*.

As to petitioners' contention that to allow evidence of emotional distress derived from conduct not addressed by the liability verdicts was to allow damages for conduct which had not been found to violate the Constitution, the Ninth Circuit found no error, holding that plaintiffs were entitled to damages proximately caused by conspiracy and there was substantial evidence from which a jury

could conclude overt acts occurring before the terminations were part of the conspiracy. App. at 33, *infra*.

As to Garrison, the Ninth Circuit reversed, finding the press release was protected speech and that the individual defendants were not entitled to qualified immunity. It reasoned that the press release was "an opinion about the preparedness of a vital public-safety institution" and that it was "patently unreasonable" for petitioners to believe it was not protected. App. at 51, 60, *infra*.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

THE NINTH CIRCUIT'S OPINION CONFLICTS WITH *MT. HEALTHY* AND WITH BASIC PRINCIPLES OF CAUSATION ESPOUSED BY CIRCUIT COURTS IN THE CONTEXT OF EMPLOYEE DISCIPLINE.

Under *Mt. Healthy*, once a plaintiff establishes that protected First Amendment conduct was a substantial factor in an adverse employment decision, the employer must demonstrate "it would have reached the same decision . . . even in the absence of protected conduct." *Mt. Healthy*, 429 U.S. at 287. In this case, the City proved it would have reached the same decision, and did, in the absence of protected conduct when it proved to the jury, upon evidence of Huntley's independent review and legitimate grounds for discipline, that protected conduct was not a substantial factor in his decision and that he was not a conspirator. However, when the Ninth Circuit

was called upon to apply the *Mt. Healthy* rule of causation to a chain of decision-making, it held that even though Huntley had legitimate grounds to impose discipline, respondents Herr and Wilson were entitled to recover damages flowing from discipline because the supervisors who started the process did so for unlawful reasons. App. at 22-24, *infra*. In its view, Huntley would not have made the same decision "in the absence of protected conduct" simply because he would not have made it at all; but for the retaliatory motives of his subordinates who set the process in motion, he would never have learned of the misconduct in the first instance. *Id.*

The Ninth Circuit commented, "This case does not fit neatly into the *Mt. Healthy* framework, because – according to the jury's findings – the disciplinary process here *began* with a retaliatory motive, but *ended* with a legitimate one." App. at 19, *infra*. In fact, the case *does* fit into the *Mt. Healthy* framework, and the Ninth Circuit has announced a rule that is so flatly inconsistent with *Mt. Healthy*'s rule of causation as to nullify it in the public employment context.

The decision to discipline is, ultimately, a unitary decision by the employer which can act only through its officials, and a decision that is retaliatory at the start but legitimate at the end presents precisely the issue of mixed motive that *Mt. Healthy* addressed. The fact that the process began with retaliatory motive on the part of a supervisor means *at most* that protected conduct was a substantial factor in the unitary ultimate decision. It does not mean a plaintiff is entitled to damages. *See Mt. Healthy*, 429 U.S. at 285 (that protected conduct played a

substantial part in the decision does not necessarily amount to a constitutional violation justifying remedial action). The rule of causation the Ninth Circuit has announced, a rule that focuses solely on whether protected conducted was a substantial factor in the adverse decision (here, solely by virtue of setting the process in motion) is exactly the rule *Mt. Healthy* rejects. *Id.* at 285-86. To permit damages simply because a subordinate initiated the disciplinary process for the wrong reasons permits an employee exactly the windfall for engaging in First Amendment activities as well as in misconduct, which *Mt. Healthy* intended courts to avoid: such an employee who can point to First Amendment conduct is better off than the employee who merely violates the rules, because he or she is entitled to damages for discipline *despite* the fact that ultimately the employer acted on legitimate grounds. *Mt. Healthy*, 429 U.S. at 285.

The practical effect of the Ninth Circuit's rule is that public employees who engage in First Amendment activities are now insulated from otherwise legitimate discipline: the decision in this case puts public employers on notice that they proceed at their peril against such employees, because legitimate grounds for discipline are ultimately irrelevant. The Ninth Circuit has thus created an anomalous situation in which a government employer who wishes to impose discipline for matters unrelated to speech is, as a practical matter, *more* restricted than a government employer who disciplines for speech outright, because in the latter situation, the employer's interests are at least a factor in the analysis. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 675, 114 S. Ct. 1878, 1887-88, 128 L. Ed. 2d 686 (1994).

The Ninth Circuit denies it is holding that final decision-makers can never absolve subordinates of liability for retaliatory acts. App. at 22, *infra*. However, it is noticeably silent as to what set of circumstances would preclude liability. No wonder. Given the pure setting-in-motion standard it articulates, a standard based on the fact that the *only* influence subordinates had on the final legitimate decision was that they initiated the process, there is no conceivable situation where the final decision-maker could absolve wrongfully motivated subordinates. In the public employment context, the final decision-maker does not act alone: the disciplinary process is multi-leveled and someone always starts the ball rolling.

Significantly, this pure setting-in-motion standard is absent from the cases to which the Ninth Circuit looked for support, cases where the final decision-makers actually *relied on* the recommendations and reasoning of unlawfully motivated subordinates: *Saye v. St. Vrain Valley Sch. Dist.*, 785 F.2d 862, 867-68 (10th Cir. 1986) (board relied "completely" on recommendation of unlawfully motivated defendants); *Professional Ass'n of College Educators v. El Paso County Community College Dist.*, 730 F.2d 258, 266 and n.14, 267 (5th Cir. 1984) (board relied on pretextual charges of unlawfully motivated college president whom jury found to be "principal actor" in dismissal process); *Hickman v. Valley Local Sch. Dist. Bd. Of Educ.*, 619 F.2d 606, 610 (6th Cir. 1980) (board relied on recommendations based on impermissible grounds that became the basis of the board's decision). App. at 20-22, *infra*.

The Ninth Circuit's rule of causation not only nullifies *Mt. Healthy*'s mixed motive analysis in the paradigmatic situation for public employment discipline, it is a striking departure from basic causation principles articulated by numerous circuits, and by another panel of the Ninth Circuit, in employment discrimination cases where race rather than politics spurred subordinates to initiate a process culminating in an adverse employment decision. *See DeHorney v. Bank of America Nat'l Trust & Sav. Ass'n*, 879 F.2d 459, 468 (9th Cir. 1989) (lack of nexus between alleged racial animus on the part of supervisor who initiated process by reporting misconduct and decision to terminate defeats inference that race was a factor in decision); *North v. Madison Area Ass'n for Retarded Citizens-Developmental Centers Corp.*, 844 F.2d 401, 408 (7th Cir. 1988) (lack of nexus between motives of supervisor who set process in motion and board's decision to eliminate position defeats claim); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547-48 (7th Cir. 1997) (when ultimate decision is made on independent, legally permissive basis, bias of subordinate irrelevant); *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) (if decision-maker bases decision on own independent investigation, causal link between subordinate's retaliatory intent and termination is broken). These cases establish that setting matters in motion for the wrong reasons does *not* make an otherwise independent, legitimate decision unlawful.

The question of how *Mt. Healthy* applies in the context of a multi-leveled review process or a chain of decision-making is one that should be addressed and settled by this Court. It is a question of vital importance to

public entities throughout the country, because disciplinary decisions are typically made in this manner, and the law can and should recognize a distinction between situations where the final decision is tainted by reliance on those who were unlawfully motivated and those where, as here, it is not. Petitioners contend that, under *Mt. Healthy*, it is a foregone conclusion that Herr and Wilson are not entitled to damages for a First Amendment violation, because they were ultimately disciplined for legitimate, not unlawful, reasons. However, if, as the Ninth Circuit believes, the case does not fit neatly under *Mt. Healthy*, the Court should address the issue because the situation presented by this case is so common and so important. The implications of the decision reach well beyond the confines of this case to create an untenable situation for public officials. Senior officials who investigate and assure themselves there are legitimate grounds for discipline now face the virtual certainty of a lawsuit, since the legitimate grounds of an independent decisionmaker will no longer purge the taint of any retaliatory motive on the part of subordinates. *See* Martin A. Schwartz & John E. Kirklin, 1A Section 1983 Litigation § 3.11 at 211 (3d ed. 1997) (quoting Laurence H. Tribe, American Constitutional Law § 12-5 at 816 (2d ed. 1988)) (under *Mt. Healthy*, employer "in effect is afforded an opportunity to 'purge its decision of the "taint" of unconstitutional motivation' "). With the First Amendment so impenetrable a shield, the potential for chilling effective management is strikingly obvious.

II.

THIS COURT SHOULD SETTLE THE IMPORTANT QUESTION OF HOW QUALIFIED IMMUNITY OPERATES WHEN A DETERMINATION OF WHAT THE LAW REQUIRES TURNS ON A MULTIFACTOR BALANCING TEST; THE OPINION CONFLICTS WITH THIS COURT'S REASONING ON QUALIFIED IMMUNITY AND THE VIEW OF OTHER CIRCUITS THAT QUALIFIED IMMUNITY IS THE RULE IN THIS CONTEXT, TO WHICH EXCEPTION IS RARE.

Qualified immunity shields a government official from liability for action taken within the scope of his authority, which may result in an unconstitutional deprivation of rights, so long as the official, at the time the action was taken, would not reasonably know it violated the employee's "clearly established" constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). This Court (and virtually every other circuit court) has recognized that where the requirements of the law are at least debatable, officials deserve the benefit of the doubt. "[Qualified immunity] provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . [I]f officers of reasonable competence could disagree [about whether specific action was constitutional], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986); *see also Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987) ("[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"). Further, "[i]f judges . . . disagree on a constitutional question, it is unfair to subject [an official] to money

damages for picking the losing side of the controversy." *Wilson v. Layne*, ___U.S.___, 119 S. Ct. 1692, 1701, 143 L. Ed. 2d 818 (1999). This case is quintessentially one where qualified immunity should apply, and that is so because the demands of the multifactor balancing test first articulated in *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), make the determination of whether particular speech is protected in the first instance a hard call.

Here, there had been a death by fire. A press release was issued by a politically hostile employee in the context of a continuing conflict between the City and the fire department over the allocation of resources. Obviously, there were First Amendment implications. However, the press release laid blame on superiors and was an invitation to sue although no investigation had been or could have been completed as to time and cause of death. Officials were entitled, indeed obligated, to consider that and to consider the potential morale problems a charge of playing politics with safety would have on firefighters. When one considers what the balancing test entails in this volatile scenario, it is inconceivable that qualified immunity could be deemed inappropriate.

The opposing views of district and appellate courts underscore that persons of reasonable competence could disagree about whether or not the press release was protected. After pondering case law and evidence over the course of a weekend (SER at 346), the district court ruled that the press release was not protected, but if the court was wrong, the individual defendants were entitled to qualified immunity because " '[in] the context in which it was made, any reasonable public official would not know

whether or not the statement [was] protected.' " App. at 48, *infra*, quoting district court. *After some eight pages of analysis*, the Ninth Circuit held that the press release was so clearly protected speech that it was "patently unreasonable" for petitioners to have believed otherwise. App. at 60, *infra*.

The district court had viewed the press release as an accusation that invited a lawsuit and pinned liability on Garrison's ultimate superiors. Case authority supports the notion that discipline may be imposed in such a circumstance. *E.g., Wright v. Illinois Dept. of Children and Family Serv.*, 40 F.3d 1492, 1504 (7th Cir. 1994) (no protection for statement from which one could reasonably infer employee was encouraging a lawsuit). Indeed, if City officials had read the very cases cited in the Ninth Circuit's opinion (App. at 57), they could reasonably have concluded, as did the district court, it would be lawful to fire Garrison. *See, e.g., Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993) ("[a]s a public safety organization, a fire department, like a police department, has a more significant interest than the typical government employer in regulating the speech activities of its employees in order ' "to promote efficiency, foster loyalty and obedience to superior officers, maintain morale and instill public confidence" ' "). However, the Ninth Circuit gave no weight to the City's concerns about a lawsuit since the City had failed to show "actual injury" (that is, presumably, the materialization of an actual lawsuit),[2]

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[2] This actual injury requirement in itself conflicts with *Waters v. Churchill*, 511 U.S. at 673 (government need only demonstrate "reasonable predictions of disruption").

and it gave no weight to concerns about morale because morale was already low and thus presumably a nonissue rather than a source of legitimate concern; instead, it gave all weight to Garrison's testimony at trial about his intentions, and saw the press release as an opinion about preparedness going to the core of protected speech. App. at 51, *infra*.

That Garrison may have addressed a matter of public concern in this situation does not nullify employer interests. It simply means that whether or not he could lawfully be fired is a close call. A close call means the individual petitioners should not be subject to personal liability. If qualified immunity does not apply here, where would it ever apply?

The Ninth Circuit's failure to recognize in this case that however the reviewing court itself might come out at the end of a complex weighing process, officials reasonably could make the wrong call, as apparently the district court did, turns a rule of deference into a rule of no deference. This no-deference rule conflicts not only with this Court's generally liberal application of qualified immunity, but also with the conclusion by numerous circuits that the multifactor *Pickering* balancing test all but compels qualified immunity for officials who turn out to be wrong about what the law requires. *See, e.g., DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (because of the particularized balancing test, difficult and subtle to apply, only infrequently will it be clearly established that speech is protected); *Borucki v. Ryan*, 827 F.2d 836, 848 (1st Cir. 1987) (when the law requires a balancing of interests, it is unfair to charge an official with knowledge of the law

absent previous cases with clearly analogous facts); *Dartland v. Metro. Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989) (qualified immunity applies except in the extraordinary case where the *Pickering* balance leads to the inevitable conclusion that discharge was unlawful); *Noyola v. Texas Dept. of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988) (rarely will there be a basis for *a priori* judgment that discipline violates employee speech rights); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986) (given fact-dependent balancing test, only rarely will constitutional rule be clearly established). The decision in this case is even at odds with another panel in the Ninth Circuit, which recognized that a "context-intensive, case-by-case balancing analysis" virtually compels qualified immunity because the law regarding First Amendment claims "will rarely, if ever," be clearly established. *Moran v. State of Washington*, 147 F.3d 839, 847 (9th Cir. 1998).

This Court has not ruled on the application of qualified immunity in the public employee speech context where a multifactor balancing test is employed. This case provides the opportunity to establish that qualified immunity should be the rule in this context and the exception limited to situations where the outcome of the balancing test is a foregone conclusion so obvious, because of existing case law, that no balancing based on the facts of a given case is even required, where, in other words, the constitutional question is "open and shut." *Wilson v. Layne*, 119 S. Ct. at 1700.

III.

TO PERMIT DAMAGES FOR CONDUCT AS TO WHICH THERE HAS BEEN NO FINDING OF CONSTITUTIONAL VIOLATION AND WHICH IS SUBJECT TO ABSOLUTE IMMUNITY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

By the verdicts returned at the conclusion of the liability phase of the trial, the jury found that certain individuals *conspired to impose discipline* on respondents Herr and Wilson in retaliation for their protected conduct.[3] This conspiracy to impose discipline was the deprivation of rights which entitled Herr and Wilson to damages, if they are entitled to damages at all, including damages for emotional distress caused by discipline. The jury made no findings as to acts such as budget cuts involving the reorganization of the fire department, the investigations by KMPG Peat Marwick and the District Attorney's Office into the overtime and payroll practices of the fire department, and the transfer of fire services to the Orange County Fire Authority shortly before trial.

The Ninth Circuit, however, found no error in permitting evidence of emotional distress derived from these events, or in refusing an instruction that would have reminded the jury that the overt act causing damages, i.e.,

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[3] The special verdict read, "Question No. 4: Did any of the defendants knowingly enter into an agreement, that is, conspire to impose discipline on plaintiff . . . with the intent to retaliate against plaintiff . . . for the exercise of his protected First Amendment rights? Answer 'yes' or 'no' after the name of each such defendant."

the constitutional deprivation, was the discipline. It reasoned that since the jury had found conspiracy, plaintiffs were entitled to whatever damages were proximately caused by conspiracy: "[T]here was substantial evidence from which the jury could conclude that the conspiracy consisted of overt acts that occurred before plaintiffs' terminations. For example, the jury could have concluded, as it apparently did, that the PTF investigation [by Peat Marwick] was part of a larger scheme to exact retribution for the firefighters' 1992 election activities and their later recall effort." App. at 33, *infra*. There is no way to know if the jury reached that conclusion, and if it did, it was not entitled to, because it was not instructed to, and the liability verdicts were limited to discipline.

The Ninth Circuit's holding goes well beyond a simple conclusion that some minor evidentiary ruling does not warrant a new trial; it establishes the rule that once one act is found to be a product of a conspiracy to deprive of constitutional rights, all other acts perceived by a plaintiff to be antithetical to his interests are, in effect, *conclusively presumed* to be a product of the conspiracy and a deprivation of First Amendment rights, so that no actual findings as to that those other acts are necessary. A plaintiff need not prove, for example, that a budget-cutting measure was motivated by his political activities; a defendant is not entitled to the defense that it would have cut the budget, even in the absence of political activities.

Since there was no finding that the Peat Marwick investigation or any other such act was an overt act amounting to a constitutional deprivation, the Ninth Circuit holding also establishes the rule that damages,

including punitive damages, may flow simply from "conspiracy" divorced from overt acts. This is in clear conflict with the law of other circuits which recognize that damages flow only from the overt acts that are the deprivation of constitutional rights, not from the "conspiracy" or agreement. *See, e.g., Scherer v. Balkema*, 840 F.2d 437, 441-42 (7th Cir. 1988); *Rutkin v. Reifeld*, 229 F.2d 248, 252 (2d Cir. 1956).

Moreover, to permit damages – through the medium of "conspiracy" – for reorganizing the fire department, investigating its practices, and eventually eliminating it altogether also conflicts with the rule of absolute immunity for legislative activity (including the activities of local legislators attempting to balance and serve the various interests of their constituencies) that has long been recognized by this Court and others. *See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 969, 140 L. Ed. 2d 79 (1998) (federal, state and regional legislators entitled to absolute immunity for legislative activities); *Watkins v. United States*, 354 U.S. 178, 187, 77 S. Ct. 1173, 1179, 1 L. Ed. 2d 1273 (1957) (power of Congress to investigate inherent in legislative process); *Cole v. Gray*, 638 F.2d 804, 811 (5th Cir. 1981) (absolute immunity for investigating financial misfeasance); *Aitchison v. Raffiani*, 708 F.2d 96, 99 (3d Cir. 1983) (mayor absolutely immune for voting to abolish a position); *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (absolute immunity for budget decision eliminating jobs); *Healy v. Town of Pembroke Park*, 831 F.2d 989, 993 (11th Cir. 1987) (absolute immunity for decision to contract out municipal services).

There is no authority for the proposition that a plaintiff has only to say the word "conspiracy" to override this

immunity. Nor should there be. To allow damages to be awarded for distress over the otherwise unactionable conduct of city officials unrelated except by allegation to discipline, virtually guarantees official paralysis in the face of politically tough decisions, if any official can be found to take the job in the first place.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL GILBROOK; MICHAEL GARRISON; DON HERR; HAL RAPHAEL; DANA BOWLER; JOE WILSON, *Plaintiffs-Appellees,* DAVIS, RENO & COURTNEY, *Plaintiff-Intervenor-Appellee,* v. CITY OF WESTMINSTER; CHARLES V. SMITH; CRAIG SCHWEISINGER; TONY LAM; DON S. ANDERSON; JOHN T. DEMONACO; BRIAN MAYHEW, *Defendants-Appellants.*	No. 96-56306 D.C. No. CV-94-02051-RAP
PAUL GILBROOK; MICHAEL GARRISON; DON HERR; HAL RAPHAEL; DANA BOWLER; WESTMINSTER FIRE FIGHTERS ASSOCIATION, LOCAL 2425; JOE WILSON; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, *Plaintiffs-Appellants,* DAVIS, RENO & COURTNEY, *Plaintiff-Intervenor-Appellee,* v. CITY OF WESTMINSTER; CHARLES V. SMITH; CRAIG SCHWEISINGER; TONY LAM; DON S. ANDERSON; JOHN T. DEMONACO; BRIAN MAYHEW, *Defendants-Appellees.*	No. 96-56375 D.C. No. CV-94-02051-RAP

PAUL GILBROOK; MICHAEL GARRISON; DON HERR; HAL RAPHAEL; DANA BOWLER; WESTMINSTER FIRE FIGHTERS ASSOCIATION, LOCAL 2425; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO; JOE WILSON, *Plaintiffs-Appellees,* DAVIS, RENO & COURTNEY, *Plaintiff-Intervenor-Appellee,* v. CITY OF WESTMINSTER; CHARLES V. SMITH; CRAIG SCHWEISINGER; TONY LAM; DON S. ANDERSON; JOHN T. DEMONACO; BRIAN MAYHEW, *Defendants-Appellants.*	No. 97-55314 D.C. No. CV-94-02051-RAP ORDER AMENDING OPINION AND DENYING PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC AND AMENDED OPINION

Appeals from the United States District Court
for the Central District of California
Richard A. Paez, District Judge, Presiding

Argued and Submitted
March 1, 1999 – Pasadena, California

Filed May 21, 1999
Amended July 15, 1999

Before: James R. Browning, Charles E. Wiggins, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

COUNSEL

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ORDER

The opinion filed May 21, 1999, is amended as follows:

On slip opinion page 4837, add the following footnote at the end of the second full paragraph:

> We do not suggest that the mere fact that a city official terminates an employee in an atmosphere of political controversy is sufficient to support a finding that the official acted with retaliatory intent. Here, Plaintiffs presented specific evidence that Demonaco's stated reasons for the termination were pretextual.

On slip opinion page 4842, second full paragraph, change the second sentence to read: "For example, the jury could have concluded, as it apparently did, that the PTF investigation was part of a larger scheme to exact retribution for the firefighters' 1992 election activities and their later recall effort."

With these amendments, the panel has voted to deny Appellants' petition for rehearing, Appellees' petition for

rehearing, and Intervenor's petition for rehearing. Judge Graber has voted to deny Appellants' petition for rehearing en banc and Intervenor's petition for rehearing en banc, and Judges Browning and Wiggins have so recommended.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on them.

The petitions for rehearing and petitions for rehearing en banc are DENIED.

OPINION

GRABER, Circuit Judge:

This action involves claims by six individual firefighters against the City of Westminster (City) and ten individual defendants, each of whom was an officer and employee of the City. The City discharged four plaintiffs and disciplined the other two, after plaintiffs became embroiled in a bitter public controversy concerning the City's funding of fire protection services, the firefighters' use of public funds, and the political activities of the firefighters' union. Plaintiffs brought this action under 42 U.S.C. § 1983, alleging that defendants, individually and collectively, had retaliated against them for exercising their First Amendment rights of free speech and association. They also alleged that defendants had defamed them by accusing them publicly of criminal wrongdoing. After a jury trial and post-trial motions, four related matters come to us: (1) an appeal by certain defendants against whom the jury rendered special verdicts; (2) a

cross-appeal by certain plaintiffs against whom the district court entered judgments as a matter of law; (3) an appeal by certain defendants regarding the attorney fees and costs awarded to two prevailing plaintiffs; and (4) an intervention by plaintiffs' trial counsel, challenging the district court's award of fees directly to their former clients.

I. FACTUAL AND PROCEDURAL HISTORY

A. *Factual History*

Our recitation of facts is governed by two principles. First, with respect to those parties in favor of whom the jury returned verdicts, we view the evidence in the light most favorable to each prevailing party. *See Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1246 (9th Cir.) (stating that principle with respect to review of a decision to grant a motion for judgment as a matter of a law), *cert. denied*, 119 S. Ct. 338 (1998). Second, with respect to those parties against whom the district court directed a verdict, we view the facts in the light most favorable to the nonmoving party. *See Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996) (stating principle).

1. *The Election and the Reorganization of the City's Fire Department*

This dispute began in November 1992, when the City held elections for the Mayor and the City Council. At that time, plaintiffs in this action – Paul Gilbrook, Michael Garrison, Don Herr, Hal Raphael, Dana Bowler, and Joe Wilson – were veteran employees of the Westminster Fire

Department and members of the Westminster Fire Fighters Association, the firefighters' union. Gilbrook was the union's president, and Garrison was its public information officer. The union had been active in local politics for nearly 20 years.

During the campaign, Smith expressed openly his bitterness toward the union for its defection. In labor contract negotiations coinciding with the election, Smith told Gilbrook and Garrison: "If you make [the staffing of fire stations] a political issue in my upcoming election, I'll have your ass." City Councilor Craig Schweisinger later told Garrison and Gilbrook: "[The Mayor] is anti-fire now. You people supported your – you're going to support Joy Neugebauer. We have problems here with this contract."

In the spring of 1993, following Smith's re-election, the Financial Review Committee (FRC), a citizens' committee appointed by the City Council to review the City's budget, produced an Interim Report on Fire Services. The FRC's report recommended, among other things, significant cuts in fire services, the dismissal of firefighters, and the curtailment of the firefighters' political activities. The report further recommended that the City explore privatizing fire services and that the City's fire department be excluded from any future contractual bidding for fire services unless the firefighters desisted from their political activities. Also of particular concern to the FRC was the fire department's practice with respect to overtime pay, which the FRC described as "abusive" and as to which it recommended an internal audit.

The FRC's report and recommendations triggered a political firestorm. The union went on the offensive, producing a video explaining the FRC's recommendations and collecting over 14,000 signatures to protest the proposed budget cuts. The anti-firefighter contingent was equally vocal. On many occasions, Mayor Smith publicly accused the firefighters of abusing the overtime system. Councilor Schweisinger called Gilbrook a "Jimmy Hoffa" and Garrison a "David Koresh" and also declared that there was a "cancer in the Fire Department . . . and we're going to cut it out."

Despite the union's protest, in July 1993 the City Council voted to reorganize the fire department by laying off six firefighters, removing a truck from service, and increasing paramedic services. Councilor Schweisinger told Herr, the then-Fire Chief, and a private citizen, Rebecca Danna, that the budget cuts were "political retribution" for the firefighters' campaign against Smith.

In response to the City Council's actions, the union joined forces with a citizens' group and mounted a recall campaign against Mayor Smith and City Council members Schweisinger, Charmayne Bohman, and Tony Lam, all of whom had voted for the reorganization of fire services. The recall election was held almost a year later, in June 1994, and the voters defeated the proposed recall by a two-to-one margin.

2. *Audit of the Fire Department*

(a) *The First Peat Marwick Report*

In July 1993, the City hired KPMG Peat Marwick to study the City's payroll and overtime practices. The City's Finance Director, Brian Mayhew, coordinated the City's efforts. In its initial report, dated September 1, 1993, Peat Marwick found that the ratio of overtime expenses to regular salaries was significantly higher in the fire department than in the City's other departments. Peat Marwick traced the inflated overtime expenditures to an informal practice of "shift trading," which allowed firefighters to receive overtime for working unscheduled shifts irrespective of whether they had worked their regularly scheduled hours. Despite that finding, the report concluded that "it does not appear that [the fire department's] personnel have engaged in activities which were not allowed under their current [labor] contracts." The report explained that the City would have to revise its current policies to reduce overtime expenses.

Following the issuance of the September 1 report, the City asked Peat Marwick to continue its study, this time focusing on the fire department and identifying the sums of overtime pay received by individual firefighters. City officials, led by City Attorney Richard Jones, newly appointed Fire Chief John Demonaco, Finance Director Mayhew, and Mayor Smith, also convinced the Orange County District Attorney's Office to investigate the fire department for possible criminal conduct in connection with the department's overtime and payroll practices.

(b) *The "Personnel Transaction Form" Policy*

In November 1993, Fire Chief Demonaco launched an "in-depth" investigation of the fire department's compliance with the City's policy requiring firefighters to file a Personnel Transaction Form (PTF) when taking paid leave. According to the City's policy, when a firefighter used sick leave, vacation time, or other compensated time off, the firefighter was required to submit a PTF to the personnel department to document the absence. On receipt of the PTF, the personnel department would deduct leave time from the employee's "leave bank." The hours in the "leave bank" had a monetary value, which the employee could "cash out" at certain times of the year. Unreported PTFs, therefore, resulted in a financial loss to the City.

Notwithstanding the obvious import of the PTF, many members of the fire department were unaware of the precise rules governing its use. Several plaintiffs testified that they never had seen a written PTF policy and had filed PTFs based on their personal understanding of what they thought the policy required. Even the fire department's timekeeper, Brian Lawler, who was responsible for recording PTFs, testified that he had never seen the PTF policy in writing and characterized it instead as a "practice."

Throughout the course of his investigation, Demonaco kept City officials informed about his findings in closed-door City Council meetings. Although Demonaco's investigation focused initially on Gilbrook, the PTF inquiry spread to other members of the fire department. At the direction of City Attorney Jones, the issue of PTF

compliance became part of Peat Marwick's audit of the fire department. The final Peat Marwick report, dated April 12, 1994, found more than 1,400 instances of missing PTFs, involving 9,500 leave hours. The report concluded that the firefighters' failure to document PTFs had cost the City more than $4.8 million over the preceding eight years. Nonetheless, the District Attorney informed the City on April 29, 1994, that there was insufficient evidence to support criminal charges against any members of the fire department.

3. *Increasing Public Rhetoric*

Throughout the winter and spring of 1994, the currents of the PTF investigation crossed frequently with the currents of the recall election. In her statement opposing the recall petition, Councilor Bohman accused the firefighters of "manipulating" the overtime system. Councilor Lam similarly alleged that the firefighters were "milking" the system and "rip[ping] off" the taxpayers. Mayor Smith continued his assault on the firefighters, accusing them of undertaking a "massive scheme" to cheat the taxpayers out of thousands of dollars. Councilor Schweisinger was even more blunt; he promised to "get" Gilbrook and Garrison and warned citizens not to believe the firefighters, because they were "crooks" and "thieves."

4. *The Candlewood Fire*

On January 28, 1994, a fire broke out in a home on Candlewood Street, resulting in the death of a child. Plaintiff Raphael, the battalion chief at the scene, told

Garrison that he thought that the tragedy could have been averted had he had the proper equipment and staff. After further discussions with firefighters who were at the scene, the union decided to issue a press release stating in part: "This tragedy is the direct result of the Mayor and [City] Council placing politics above the safety of the people."

Shortly thereafter, the City suspended Garrison, the union's information officer, who had issued the press release. The City discharged Garrison several months later, citing as the reasons for his discharge Garrison's issuance of the press release and his failure to comply with the PTF policy.

5. *Disciplinary Action Against Other Plaintiffs*

In February 1994, the City dismissed Gilbrook, accusing him of "embezzl[ing]" the City's funds, violating the PTF policy, and driving a fire truck with a suspended license. On April 14, 1994, two days after Peat Marwick issued its final report, the City fired Raphael, Herr, Wilson, and Bowler for "fraudulently" accumulating paid leave time in violation of the PTF policy. The City also charged Raphael and Herr with "gross negligence" for permitting Gilbrook to drive with a suspended license. On the day of the recall election, June 7, 1994, another 40 firefighters, all of whom had violated the PTF policy, received notices of discipline, but none lost their jobs.

The proceedings that led to plaintiffs' terminations involved a multi-tiered process that lasted several months. First, Fire Chief Demonaco initiated the disciplinary action against each plaintiff by sending a notice

of termination, outlining the reasons for the discharge. Assistant City Manager Don Anderson then conducted plaintiffs' *Skelly* hearings,[1] in each instance affirming Demonaco's recommendation to discharge. Finally, the then-City Manager, Robert Huntley, reviewed the recommendations of discharge and made the final determination whether to ratify, reject, or modify the disciplinary action.[2] Huntley sustained the terminations of Gilbrook, Garrison, Herr, and Raphael, but reinstated Wilson and Bowler, finding that dismissal was "too severe" a penalty for their respective PTF-policy violations. Instead, Wilson and Bowler each received a 30-day suspension and a reduction in pay for one year.

6. *Contracting Out of Fire Services*

In mid-1995, the City Council voted to disband the fire department and decided instead to contract for fire services with the Orange County Fire Authority (OCFA). A provision of that contract provided that the OCFA

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[1] The term "Skelly hearing" derives from *Skelly v. State Personnel Board*, 539 P.2d 774, 783-84 (Cal. 1975), in which the California Supreme Court held that a civil service employee has a property interest in the continuation of employment, an interest that is protected by the right of due process.

[2] The disciplinary process in this case was truncated. Ordinarily, after the City Manager rules, the matter goes to a third-party personnel commission or arbitrator. That third party conducts an evidentiary hearing and makes a recommendation to the City Council, which then makes a final decision on discipline. Here, however, the parties agreed to stay arbitration. As a result, plaintiffs' disciplinary cases never came before the City Council. Thus, for purposes of this case, Huntley was the final decisionmaker in the City's termination process.

would not hire any firefighter whom the City had discharged. As a result, Gilbrook, Garrison, Herr, and Raphael, the only plaintiffs whom the City had terminated, could not seek employment with the OCFA, while the City's remaining firefighters were able to do so.

B. *Procedural History*

On March 31, 1994, the union, Gilbrook, and Garrison brought this action under 42 U.S.C. § 1983 against the City and 10 individual defendants: Mayor Smith; City Council members Schweisinger, Bohman, and Lam; former City Managers Jerry Kenny and Huntley; City Attorney Jones; Assistant City Manager Anderson; Finance Director Mayhew; and Fire Chief Demonaco. Gilbrook and Garrison alleged that each of the individual defendants (1) had terminated them in retaliation for having exercised their rights of free speech and association (individual liability), (2) had conspired to retaliate against them for exercising those rights (co-conspirator liability), and (3) had denied them equal protection under the law, individually and as a co-conspirator. Gilbrook and Garrison also asserted state-law claims of slander per se against the individual defendants. *See* Cal. Civ. Code § 46 (defining slander). Finally, plaintiffs alleged that the City was municipally liable for the individual defendants' actions. In September 1994, Gilbrook and Garrison amended their complaint, adding as plaintiffs Herr, Raphael, Bowler, Wilson, and 21 other firefighters.

On July 21, 1995, the district court issued a pretrial conference order bifurcating the trial. The order provided that the claims of Gilbrook, Garrison, Herr, Raphael,

Wilson, Bowler, and the union would be tried first, in four phases: liability, compensatory damages, punitive damages, and municipal liability. The trial involving the remaining 21 plaintiffs would occur later.

The liability phase began before a jury on July 25, 1995. At the close of plaintiffs' case-in-chief, defendants moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The district court granted that motion with respect to Garrison's civil rights claims against all defendants. As to the other plaintiffs' claims of retaliation, the district court entered judgment in favor of all defendants except Demonaco, Anderson, and Huntley, who had played direct roles in the disciplinary process. With respect to the claims of conspiracy to retaliate and of denial of equal protection under the law, the district court denied the motion as to all defendants. Finally, with respect to plaintiffs' various claims of slander per se, the district court ruled that only two statements were actionable as a matter of law: (1) Schweisinger's statement that Gilbrook was "a Jimmy Hoffa" and (2) Schweisinger's statement that Gilbrook and Garrison were "crooks" and "thieves."

The surviving claims then went to the jury which, by special verdict, returned a hodgepodge of results. Herr, Wilson, and Bowler prevailed on their claims of retaliation against Demonaco and Anderson, but not against Huntley. Those three plaintiffs also prevailed on their claims of conspiracy to retaliate and their equal protection claims against Demonaco, Anderson, Smith, Schweisinger, Lam, and Mayhew, but not against Kenny, Huntley, Jones, and Bohman. Raphael succeeded only on his equal protection claim, while Gilbrook succeeded on none of

his civil rights claims. Finally, the jury found that Schweisinger was liable for calling Gilbrook a "Jimmy Hoffa," but was not liable for referring to Gilbrook and Garrison as "crooks" and "thieves." Following the liability phase, the jury awarded the prevailing plaintiffs compensatory and punitive damages. At the final stage, the district court held that the City was municipally liable for the actions of Smith, Schweisinger, and Lam.

After the trial ended, defendants again moved for judgment as a matter of law and for a new trial under Federal Rule of Civil Procedure 50(b). The district court denied that motion with respect to (1) the jury's verdict in favor of Herr and Wilson on their claims of retaliation and conspiracy to retaliate and (2) the jury's verdict in favor of Gilbrook on his claim of slander per se. With respect to Bowler's retaliation claims, the district court agreed with defendants that there was insufficient evidence to prove that Bowler had engaged in any protected political activity. However, instead of entering judgment as a matter of law in favor of defendants, the district court ordered a new trial on the ground that defendants had failed to make a timely Rule 50(a) motion with respect to Bowler at the close of plaintiffs' case-in-chief. Finally, the district court granted defendants' Rule 50(b) motion with respect to plaintiffs' equal protection claims, but conditionally granted a new trial as to those claims under Federal Rule of Civil Procedure 50(c).[3]

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[3] Under Federal Rule of Civil Procedure 50(c)(1), if

> the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be

Once the post-trial dust settled, the only plaintiffs to have prevailed on their civil rights claims were Herr and Wilson. They moved for attorney fees and costs under 42 U.S.C. § 1988(b). The district court granted that motion, awarding attorney fees and costs in the amount of $977,166.68 directly to Herr and Wilson.

We now have before us appeals from the various judgments entered by the district court. First, defendants[4] contest the jury's verdicts in favor of Herr, Wilson, and Gilbrook and the new trial ordered as to Bowler. Second, plaintiffs[5] cross-appeal, challenging the district court's entry of judgment as a matter of law on their equal protection claims and on Garrison's civil rights claims. Plaintiff Bowler also cross-appeals, contesting the new trial ordered as to his retaliation claims. Third, defendants seek review of the amount of attorney fees and costs awarded to Herr and Wilson. Finally, plaintiffs' trial counsel, Davis, Reno & Courtney, intervenes on appeal,

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> granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment.

Here, the district court entered judgment as a matter of law in favor of defendants on plaintiffs' equal protection claims, but conditionally granted a new trial, on the ground that it had given the jury an erroneous instruction on equal protection.

[4] "Defendants" here refer to those defendants against whom the jury returned verdicts, namely, Demonaco, Anderson, Smith, Schweisinger, Lam, and Mayhew.

[5] "Plaintiffs" here refer to those plaintiffs in favor of whom the jury entered verdicts, namely, Herr, Wilson, Bowler, and Raphael.

claiming that the district court should have awarded fees and costs directly to counsel, instead of to Herr and Wilson.

II. DEFENDANTS' MAIN APPEAL (NO. 96-56306)

A. *The Mt. Healthy Question*

Defendants' main appeal presents an issue of first impression in this circuit regarding a claim of retaliatory firing in a multi-tiered termination process. It is undisputed that defendants Demonaco, Anderson, and Huntley all participated directly in the process resulting in the disciplinary actions taken against plaintiffs Herr, Wilson, and Bowler (the only plaintiffs who prevailed on their retaliation claims). Those defendants did so, however, to varying degrees and at different stages. Demonaco was the driving force behind the PTF investigation and made the initial decisions to terminate plaintiffs; Anderson conducted plaintiffs' *Skelly* hearings and affirmed Demonaco's recommendations; and Huntley served as the final decision-maker, sustaining Herr's termination, but reducing Wilson's and Bowler's punishments to a suspension and a reduction of pay. When asked to determine each defendant's actual motive for taking adverse action against plaintiffs, the jury returned mixed findings. The jury found that plaintiffs' protected conduct had played a "substantial or motivating" role in Demonaco's and Anderson's actions against plaintiffs, but had not played such a role in the actions of Huntley.

Based on those findings, defendants contend that, under the mixed-motive analysis of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274

(1977), plaintiffs' claims of First Amendment retaliation cannot survive as a matter of law. Defendants argue that, under *Mt. Healthy*, "if the defendant demonstrates the same decision would have been made even in the absence of protected conduct, plaintiff's proof of causation fails, there is no violation of the First Amendment." Defendants reason that, because the jury found that plaintiffs' protected conduct did *not* play a "substantial or motivating" role in Huntley's decision-making, his legitimate, nonretaliatory motive "cuts off" the liability of his subordinates, Demonaco and Anderson, and the co-conspirator defendants, Smith, Schweisinger, Lam, and Mayhew. The district court rejected defendants' argument, a decision that we review *de novo*. *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir. 1998) (applying that standard of review to constitutional issues).

In *Mt. Healthy*, the Supreme Court held that, in an environment where both legitimate and illegitimate motives may have played a part in an adverse employment action, the ultimate inquiry is whether the employer "would have reached the same decision as to [the plaintiff's] [ ]employment even in the absence of the protected conduct." 429 U.S. at 287. In so holding, the Court rejected a rule that "focuse[d] solely on whether [the plaintiff's] protected conduct played a part" in the employer's decision. *Id.* at 285. Such a limited inquiry, the Court reasoned, "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.*

> A borderline or marginal candidate should not have the employment question resolved against

> him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 286. The First Amendment, the Court stated, "is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Id.* at 285-86.

The Court then formulated a two-part burden-shifting inquiry for cases involving mixed motives for discharge. First, the plaintiff must show that his or her conduct was constitutionally protected and that the conduct was a "substantial" or "motivating" factor in the defendant's employment decision. *Id.* at 287. If the plaintiff makes those showings, then the burden shifts to the defendant to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the [plaintiff's] protected conduct." *Id.*

This case does not fit neatly into the *Mt. Healthy* framework, because – according to the jury's findings – the disciplinary process here *began* with a retaliatory motive, but *ended* with a legitimate one. That is, although the ultimate decision-maker, Huntley, had a legitimate motive to impose discipline, the retaliatory motives of two subordinates, Demonaco and Anderson, set in motion the chain of events that led to Huntley's review and to the adverse employment action.

In *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978), this court explained the nature of liability under § 1983.[6] This court held that "personal participation is not the only predicate for section 1983 liability. Anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable." *Id.* at 743. This court further explained that the "requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Id.* at 743-44.

Although this court has not addressed the issue of liability in the precise circumstances of this case, our sister circuits have done so in a manner consistent with the law of this circuit, as articulated in *Johnson v. Duffy*. They have held that, when a superior makes a nonretaliatory decision to uphold a discharge, such a decision does not automatically immunize a subordinate against liability for her retaliatory acts, which led ultimately to the dismissal. In *Professional Ass'n of College Educators v. El Paso County Community College District*, 730 F.2d 258 (5th Cir. 1984), the defendants were the El Paso County Community College District (College), the College's Board of

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[6] Section 1983 provides in part that "[e]very person who, under color of any statute of any state . . . , subjects, or *causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983 (emphasis added).

Trustees, and the College's president. The College's president had recommended that the plaintiff be dismissed, a recommendation that the Board of Trustees affirmed. Although the jury found that the president had acted with a retaliatory intent, the defendants argued that they could not be held liable for a retaliatory discharge, because the jury also had found that the Board of Trustees, the final decision-maker, was not so motivated. In other words, the defendants claimed that the Board of Trustees' legitimate decision inoculated them against liability. The Fifth Circuit rejected the defendants' argument. The court reasoned:

> The causation issue in first amendment cases is purely factual: did retaliation for protected activity cause the termination in the sense that the termination would not have occurred in its absence? It is not necessary that the improper motive be the final link in the chain of causation: *if an improper motive sets in motion the events that lead to termination that would not otherwise occur, "intermediate step[s] in the chain of causation" do not necessarily defeat the plaintiff's claim.*

Id. at 266 (citation omitted) (emphasis added). The court concluded that, even though a final decision-maker may stand between the wrongfully motivated subordinate and the plaintiff, the element of causation is satisfied if the final decision-maker "would not have considered dismissing [the plaintiff] if [the wrongfully motivated subordinate] had not brought charges in reprisal for protected activity" in the first place. *Id.* Other circuits have taken a similar approach. *See Saye v. St. Vrain Valley Sch. Dist.*, 785 F.2d 862, 867-68 (10th Cir. 1986) (holding that liability for a retaliatory discharge is not cut off, when a school board

decides to dismiss a teacher based on the recommendation of a school principal who had retaliatory intent); *Hickman v. Valley Local Sch. Dist. Bd. of Educ.*, 619 F.2d 606, 610 (6th Cir. 1980) (holding that, when a line of causation exists, "and the principal or superintendent predicated their recommendations on constitutionally impermissible reasons, these reasons become the basis of the decision by the Board members").

We are persuaded by the reasoning of those authorities. The focus of the *Mt. Healthy* mixed-motive analysis is not whether the defendant has produced some legitimate basis for the disciplinary action, but rather whether the disciplinary action would have been taken against the plaintiff "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. Thus, in the same way that an employee cannot use protected conduct as a shield against a dismissal that would have occurred even in the absence of the protected conduct, a subordinate cannot use the nonretaliatory motive of a superior as a shield against liability if that superior never would have considered a dismissal but for the subordinate's retaliatory conduct. That principle applies equally to those defendants found to have conspired with Demonaco and Anderson. They cannot escape co-conspirator liability merely because the jury found that the last person with review authority in the disciplinary process had a legitimate motive. To hold otherwise would place an employee in a *worse* "position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at 285.

In support of their position, defendants rely on authorities addressing the element of causation in Title

VII discrimination actions, as it relates to the question of vicarious liability. For example, defendants cite *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997), for the proposition that, "when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and legally permissive basis, the bias of the subordinate is not relevant." *See also DeHorney v. Bank of Am. Nat'l Trust & Savs. Ass'n*, 879 F.2d 459, 467 (9th Cir. 1989) (holding that the plaintiff had failed to make out a *prima facie* case of race discrimination, when there was no evidence to establish a nexus between the subordinate's racial slur and the superior's decision to terminate); *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) (holding that, if the final decision-maker "based his decisions on his own independent investigation, the causal link between" the subordinates' retaliatory intent and the plaintiffs' terminations would be broken).

We do not disagree with the principles articulated in those authorities. Rather, those authorities emphasize, as we do here, that the *Mt. Healthy* mixed-motive inquiry is an intensely factual one, the results of which will vary depending on the circumstances. We do not hold that a final decision-maker who lacks any improper motive *never* can absolve a subordinate of liability for his or her retaliatory acts, any more than we hold that such a decision-maker *always* can absolve the subordinate. Indeed, we express no opinion as to what the result should be, as a matter of law, if the facts showed that the final decision-maker made a wholly independent, legitimate decision to discharge the plaintiff, uninfluenced by the retaliatory

motives of a subordinate. *See Professional Ass'n*, 730 F.2d at 266 n.14 (declining to reach that same question).

Those are not the facts before us, however. Even though Huntley was the final decision-making authority in a multi-tiered termination process, by the logic of its verdict, the jury must have concluded that Huntley would not have disciplined Herr, Wilson, or Bowler if Demonaco and Anderson had not brought charges against those plaintiffs in the first place. *Cf. id.* (holding the same under similar facts). As discussed, it was not improper as a matter of law for the jury to reach such a conclusion.[7]

B. *Sufficiency of the Evidence*[8]

We move next to defendants' contention that there was insufficient evidence to support the jury's verdicts on the claims of retaliation. Defendants maintain that the district court should have entered judgment as a matter of law in their favor on those claims or, alternatively,

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[7] The jury's exoneration of Huntley has no effect on municipal liability, because the City was not held liable based on Huntley's ratification of the disciplinary action against plaintiffs. Rather, municipal liability was imposed because City officials with final decision-making authority in personnel matters, Mayor Smith and City Council members Schweisinger and Lam, directly participated in the conspiracy to retaliate against plaintiffs.

[8] For the reasons stated at page 4851-52, below, we conclude that there was insufficient evidence to support the jury's verdict in favor of Bowler. We, therefore, do not consider Bowler to be a "plaintiff" for purposes of this section.

should have granted a new trial because the jury's verdicts were against the clear weight of the evidence. *See Rattray v. City of Nat'l City*, 51 F.3d 793, 800 (9th Cir. 1994) (holding that the district court has discretion to grant a new trial when the jury's verdict is contrary to the "clear weight of the evidence" or is based on false evidence, or when a new trial is needed to prevent a "miscarriage of justice") (citation and internal quotation marks omitted). We are not persuaded by either argument.

The standard of review for the denial of a motion for judgment as a matter of law after a jury trial is the same as the standard of review for reviewing a jury's verdict: "both the verdict and the denial of the motion must be affirmed if there is substantial evidence to support the verdict." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370-71 (9th Cir. 1987). "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Id.* at 1371. We may not assess the credibility of witnesses in determining whether substantial evidence exists to support the jury's verdict. *See id.* Additionally, we review for abuse of discretion the district court's denial of a motion for a new trial grounded on the assertion that the jury's verdict was against the clear weight of evidence. *See id.* at 1372 (stating standard of review).

In addition to finding that defendants Demonaco and Anderson had retaliated directly against plaintiffs Herr and Wilson, the jury found that defendants Demonaco, Anderson, Smith, Schweisinger, Lam, and Mayhew had conspired to retaliate against Herr and Wilson. "A civil conspiracy is a combination of two or more persons who,

by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Vieux v. East Bay Reg'l Park Dist.*, 906 F.2d 1330, 1343 (9th Cir. 1990) (citation and internal quotation marks omitted). To prove a civil conspiracy, the plaintiff must show that the conspiring parties "reached a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *Id.* (citation and internal quotation marks omitted). "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989) (en banc). A defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions. *See United States v. Calabrese*, 825 F.2d 1342, 1348 (9th Cir. 1987) (involving a criminal conspiracy).

On this record, we are satisfied that there was substantial evidence from which the jury could infer that defendants had retaliated and had conspired to retaliate against Herr and Wilson. To varying degrees, each defendant participated in the events surrounding the adverse employment actions taken against plaintiffs. From that participation, the jury could have inferred that defendants reached a "unity of purpose or a common design" to retaliate against plaintiffs for exercising their constitutionally protected rights.

Demonaco played the most direct and active role in the disciplinary process. For example, he spearheaded the PTF investigation and kept other defendants informed

about his findings by way of closed-door City Council meetings. He also prepared and issued the notices of discharge accusing plaintiffs of fraud and/or embezzlement, when such charges had not been substantiated by the Orange County District Attorney's Office. Demonaco later confessed to Gilbrook that he thought that Gilbrook had done nothing wrong.

Defendants maintain that such evidence can give rise to only one reasonable inference: that Demonaco was discharging his proper duties as Fire Chief, not retaliating against plaintiffs. We cannot agree. "Acts which seem otherwise innocent, when viewed in the context of the surrounding circumstances, may justify an inference of complicity." *United States v. Batimana*, 623 F.2d 1366, 1368 (9th Cir. 1980). That principle applies squarely in this case, where the caustic political environment surrounding plaintiffs' discharges may have caused the jury to infer that an ulterior motive lay at the heart of Demonaco's actions.[9]

The same can be said about Anderson. Like Demonaco, Anderson was involved directly in the disciplinary process. He served as plaintiffs' *Skelly* hearings officer and, in each instance, affirmed Demonaco's recommendation of discharge. Moreover, despite knowing that he would be sitting in judgment of plaintiffs, Anderson

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[9] We do not suggest that the mere fact that a city official terminates an employee in an atmosphere of political controversy is sufficient to support a finding that the official acted with retaliatory intent. Here, Plaintiffs presented specific evidence that Demonaco's stated reasons for the termination were pretextual.

attended the closed-door City Council meetings, during which Demonaco discussed the PTF investigation and recommended what actions should be taken against the firefighters. Then, after the *Skelly* hearings, Anderson met with Demonaco to discuss the notices of termination. From the foregoing evidence, the jury could have concluded that Anderson was a biased hearings officer, who rubber-stamped Demonaco's findings and recommendations. Such an inference is enough to tie Anderson to the conspiracy. *Cf. United Steelworkers*, 865 F.2d at 1541 ("Evidence that police failed to exercise independent judgment will support an inference of conspiracy with a private party.").

The participation of the City's elected officials (Smith, Schweisinger, and Lam) is more attenuated than that of Demonaco and Anderson, but there is sufficient evidence in the record to connect those defendants to a retaliatory scheme or plan. Each of those defendants was present during the closed-door City Council meetings, during which Demonaco discussed what disciplinary actions should be taken against plaintiffs. Additionally, Smith, Schweisinger, and Lam each made several hostile statements about the City's firefighters, including threats of political retribution and accusations of criminal conduct, from which the jury could have inferred that those defendants shared a unity of purpose with Demonaco and Anderson.[10]

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[10] Defendants rely on *Nunez v. City of Los Angeles*, 147 F.3d 867 (9th Cir. 1998), for the proposition that words alone cannot form the basis of a claim of retaliation. Although that is a correct statement of the law, that principle is inapplicable here. In

Finally, Mayhew, too, made disparaging comments about the firefighters and played an active role in the investigation and termination of plaintiffs. Mayhew was the City's point person with Peat Marwick, attended meetings with the Orange County District Attorney's Office, and worked closely with the FRC. He routinely referred to the firefighters as "crooks" and "thieves," often in the presence of City Council members. Huntley, Mayhew's superior, even warned Mayhew that he needed to refrain from making such remarks to City Council members, because they (Huntley and Mayhew) did not know whether the firefighters had committed a crime and their job was only to present facts to the City Council. Such evidence was sufficient to connect Mayhew to the conspiracy.

In summary, there was substantial evidence to support the jury's verdicts in favor of plaintiffs Herr and Wilson on their claims of retaliation. The district court properly denied defendants' motions.

Nunez, this court rejected the plaintiff's claim of retaliation, because the defendants' "bad-mouth[ing]" and verbal threats had not resulted in any adverse employment action. *Id.* at 875. The absence of any cognizable injury prompted this court to observe that "[i]t would be the height of irony, indeed, if mere speech, in response to speech, could constitute a First Amendment violation." *Id.* Here, of course, defendants subjected plaintiffs to more than just "bad-mouthing" and verbal threats: Herr lost his job, and Wilson lost a substantial amount of pay.

C. *Additional Grounds for a New Trial*

We turn now to the multitude of additional alleged errors that defendants claim were highly prejudicial and warrant a new trial. We are persuaded by none of defendants' arguments.

1. *Evidentiary Errors*

Defendants challenge several of the district court's evidentiary decisions. We review those rulings for abuse of discretion. *See EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997) (stating that standard of review). "To order a reversal on the basis of an erroneous evidentiary ruling, we must find not only that the district court abused its discretion but also that the error was prejudicial. Reversal of a jury verdict is not warranted unless the evidentiary error affects a party's substantial rights." *Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995) (citation omitted).

Defendants first contend that the district court erred by admitting those portions of the FRC's report recommending that fire services be privatized and that the City's fire department be excluded from any future contractual bidding process unless the firefighters curtailed their political activities. Defendants maintain that such evidence was inadmissible, on the grounds that it was hearsay, irrelevant, and prejudicial. We disagree.

With respect to the hearsay objection, the district court properly admitted all portions of the FRC's report under the public records exception to the rule against hearsay. *See* Fed. R. Evid. 803(8). A trial court may presume that public records are authentic and trustworthy.

See Johnson v. City of Pleasanton, 982 F.2d 350, 352 (9th Cir. 1992). The burden of establishing otherwise falls on the opponent of the evidence, who must come "forward with enough negative factors to persuade a court that a report should not be admitted." *Id.* Here, defendants produced no evidence whatsoever to raise doubts about the reliability of the FRC's report, in whole or in part. Defendants have not contested the factual foundation of the report, nor have they suggested that the FRC failed to perform "their duties properly without motive or interest other than to submit accurate and fair reports." *Id.* at 352-53 (citation and internal quotation marks omitted). Moreover, the fact that the challenged portion of the FRC's report contains a recommendation or opinion does not remove it from the purview of Federal Rule of Evidence 803(8). *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 162 (1988) ("[F]actually based conclusions or opinions . . . are not on that account excluded from the scope of Rule 803(8)(C).").

With respect to the remaining objections, the district court properly admitted the challenged portions of the FRC's report, because they were relevant to establishing the circumstances in which the alleged retaliation occurred and were probative of defendants' actual motives for their actions. As the district court held, the evidence was "probative on the issue of defendants' intent as to whether the defendants adopted any of the recommendations, and whether or not the recommendations originated with citizens." Any prejudice that defendants may have suffered did not substantially outweigh the probative value of that evidence. *See* Fed. R. Evid. 403.

Next, defendants complain that the district court erred by permitting Gilbrook to testify that Demonaco had told him, after his dismissal, that he (Gilbrook) "had done nothing wrong" and that "the whole mess . . . was the cause of Brian Mayhew." Defendants argue on appeal that Gilbrook's testimony was inadmissible because Demonaco had made those statements during the course of settlement discussions in which Demonaco offered to reinstate Gilbrook. *See* Fed. R. Evid. 408 ("Evidence of conduct or statements made in compromise negotiations is . . . not admissible" to prove liability.). *At trial*, however, when plaintiffs first offered Gilbrook's testimony, defendants objected to its admission only on the grounds that it was irrelevant and hearsay. By failing to make a timely and specific objection on the basis of Rule 408, *see* Fed. R. Evid. 103(a)(1),[11] defendants waived their right to contest the admission of Gilbrook's testimony on that ground. *See ESCO Corp. v. United States*, 750 F.2d 1466, 1469-70 (9th Cir. 1985) (applying the rule of waiver in analogous circumstances).

Defendants also challenge the admission of certain hearsay statements made by Smith ("I'll have your ass") and Schweisinger (statements regarding political retribution), on the ground that the district court erroneously admitted those statements under the co-conspirator exception, *see* Fed. R. Evid. 801(d)(2)(E). We decline to

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[11] Federal Rule of Evidence 103(a)(1) provides that error may not be predicated upon the admission of evidence, unless "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."

reach the merits of that argument, because the district court properly admitted those statements under the exception for admissions by a party-opponent, *see* Fed. R. Evid. 801(d)(2)(A). *See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 874 (9th Cir. 1987) ("We may affirm the district court on any ground supported by the record.").

As their final assignment of evidentiary error, defendants object to the admission of evidence relating to plaintiffs' emotional distress predating the disciplinary actions taken against them. Defendants assert that such evidence should have been excluded, because it was irrelevant to establishing the injury proximately caused by the disciplinary actions. We disagree. As plaintiffs correctly argue, the jury not only found that Anderson and Demonaco were liable individually for retaliating against plaintiffs, but also found that Anderson, Demonaco, and four other defendants had conspired to retaliate against plaintiffs because of their protected activities. Thus, whatever damages plaintiffs suffered as a proximate cause of the conspiracy were recoverable. *See Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1039 (9th Cir. 1990) ("To be actionable, the conspiracy must result in overt acts, done in furtherance of the conspiracy, that are both the cause in fact and proximate cause of plaintiffs' injuries.").

Here, there was substantial evidence from which the jury could conclude that the conspiracy consisted of overt acts that occurred before plaintiffs' terminations. For example, the jury could have concluded, as it apparently did, that the PTF investigation was part of a larger scheme to exact retribution for the firefighters' 1992 election activities and their later recall effort. Evidence of

emotional distress proximately caused by those pre-discharge actions was relevant to establishing plaintiffs' injuries and, therefore, was properly admitted.

2. *Jury Instructions*

Next, we consider defendants' argument that a new trial is warranted, because the district court read to the jury two prejudicial instructions. "Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996). Because the district court has substantial latitude in tailoring jury instructions, we review the formulation of those instructions for abuse of discretion. *See Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1046 (9th Cir. 1998) (stating that standard of review). However, "[i]f the instructions are challenged as a misstatement of the law, they are then reviewed *de novo*." *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998) (citation and internal quotation marks omitted).

Defendants first contend that the jury instruction on conspiracy was erroneous. That instruction, which plaintiffs adopted from a form instruction on conspiracy, *see* Edward J. Devitt *et al.*, 3 *Federal Jury Practice and Instruction* § 103.23 (4th ed. 1987) (setting forth the standard conspiracy instruction), provided in pertinent part:

> In order to establish that a conspiracy existed, the plaintiffs must show that members of the conspiracy in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

Defendants assert that the foregoing instruction "offers no meaningful standard to guide the jury's decision as to what conduct may serve to connect a defendant to a conspiracy." Although defendants concede that the instruction "represents a summation of decisional law," they argue that its wording – "in some way or manner, or through some contrivance, positively or tacitly" – is so vague as to render that instruction meaningless. Fairly read, defendants' argument is an attack on the wording of the instruction, not on its statement of the substantive law. That being so, we review the instruction for abuse of discretion. *See Kendall-Jackson,* 150 F.3d at 1046 (stating that standard of review).

When read as a whole, the jury instruction is not so open-ended as to permit jurors to infer, as defendants fear, a conspiracy "from the mere fact that two defendants shared a dislike of the plaintiff." The instruction cautioned that the "[m]ere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and may have discussed some common aims and interests, is not necessarily proof of the existence of a conspiracy." We have recognized, in the criminal context, that such cautionary wording is adequate to protect against the possibility that jurors might infer a conspiratorial relationship merely from close association. *See United States v. Kenny,* 645 F.2d 1323, 1337 (9th Cir. 1981) (so holding); *see also United Steelworkers,* 865 F.2d at 1549 (Trott, J., dissenting) (noting that the form jury instruction is "carefully distilled from controlling case law"). The same wording is equally effective in the civil context.

Accordingly, we conclude that the district court's decision to use the standard jury instruction on conspiracy did not constitute an abuse of discretion.

Next, as a challenge to the district court's jury instruction on compensatory damages, defendants repackage their argument relating to the admission of certain evidence of emotional distress. They maintain that it "was prejudicial error to instruct the jury that plaintiffs were entitled to damages for 'all the injuries . . . they suffered.' " Defendants' argument lacks merit.

First, defendants misstate the district court's jury instruction on compensatory damages. That instruction nowhere stated that plaintiffs should be compensated for "all the injuries . . . they suffered." Rather, the instruction on damages specified that compensatory damages could be awarded "only for injuries that the plaintiff proves were proximately caused by defendant's deprivation of plaintiffs[']constitutional rights." Moreover, the instruction defined the types of economic and noneconomic losses for which plaintiffs could be compensated (e.g., back pay, employee benefits, pain, and suffering) and cautioned that "damages . . . must be fair compensation" and must not be premised on "sympathy, speculation, or guess work." Reading the instruction as a whole, we conclude that the district court did not abuse its discretion.

For the reasons discussed in the preceding three sections, we affirm the judgments in favor of plaintiffs Herr and Wilson against Demonaco, Anderson, and the coconspirator defendants, Smith, Schweisinger, Lam, and Mayhew.

D. *Gilbrook's Claim of Slander Per Se*

Up next for review is Gilbrook's state-law claim of slander per se against defendant Schweisinger. By special verdict, the jury concluded that Schweisinger had defamed Gilbrook by calling him a "Jimmy Hoffa." Following trial, Schweisinger moved for judgment as a matter of law under Rule 50(b), on the grounds that (1) the "Jimmy Hoffa" statement constituted constitutionally protected "figurative or hyperbolic language" that could not be an "objectively verifiable event," *see Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (stating principles), and (2) there was insufficient proof of either publication or actual malice. The district court rejected Schweisinger's first argument, concluding that "Jimmy Hoffa is universally known as an unscrupulous union leader, [whose] reputation is drenched in his ties to the criminal underworld. . . . The implication [of Schweisinger's statement] was clear: Gilbrook was a thief." The district court also ruled that there was substantial evidence to support the jury's verdict. Schweisinger challenges both of those rulings, each of which we are to review *de novo*. *See Gerritsen v. City of Los Angeles*, 994 F.2d 570, 575 (9th Cir. 1993) (stating that standard of review for questions involving the First Amendment); *Lawson v. Umatilla County*, 139 F.3d 690, 692 (9th Cir. 1998) (applying that standard of review to decisions denying or granting judgment as a matter of law). We need to reach only the first issue, because we conclude that the district court erred.

The First Amendment places limits on the types of speech that may give rise to a defamation action under state law. *See Milkovich*, 497 U.S. at 14-21 (citing cases).

Such protection extends to statements of opinion, addressing matters of public concern, that do not "contain a provably false factual connotation," *id.* at 20, and to statements that cannot "reasonably [be] interpreted as stating actual facts," *id.* (citation and internal quotation marks omitted); *see also Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995) ("The scope of constitutional protection extends to statements of opinion on matters of public concern that do not contain or imply a provable factual assertion."). Thus, a court reviewing a claim of defamation must ask a threshold question: Could a reasonable factfinder conclude that the contested statement implies an assertion of objective fact?[12] *See Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995) (setting forth that threshold inquiry).

To make that determination, this court has adopted a three-part test, in which we must examine the totality of the circumstances in which the defendant made the challenged statement.

> First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable

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[12] The district court posed this question to the jury. Each special verdict form addressing the claim of slander per se asked: "Was this statement an opinion which did not convey a provably false assertion of fact?" The parties have not asserted on appeal that this procedure was erroneous, so we need not consider whether it was.

> expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

Underwager, 69 F.3d at 366.

Applying the *Underwager* analysis here, we conclude that Schweisinger's "Jimmy Hoffa" statement was protected by the First Amendment and, therefore, was not the type of speech that may be the subject of a state-law defamation action. First, the broad context in which Schweisinger made his statement negates the impression that he intended to assert that Gilbrook was guilty of actual criminal conduct. Schweisinger made the statement in the summer of 1993, during the contentious public debate about whether to adopt the FRC's recommendation to cut the fire department's budget. At that time, the PTF scandal had not yet surfaced, nor had Peat Marwick released its initial report detailing the fire department's inflated overtime expenses. The second Peat Marwick report, which specified the number of PTF violations of each firefighter, including Gilbrook, came months later. Thus, the political environment, although acrimonious, was not yet saturated with public accusations of criminal wrongdoing, as it would be six months later. This general context makes clear that Schweisinger's statement conveyed little more than his opinion about a union official, who was a political opponent in a tense political climate. *Cf. id.* at 366-67 (observing that the general context involved a controversial subject about which the plaintiff and the defendant were on opposite sides).

Second, Schweisinger's use of the name of a notorious union leader to characterize Gilbrook, who also was a union leader, constitutes the type of "colorful, figurative rhetoric that reasonable minds would not take to be factual." *Id.* at 367. During the course of a public debate or a labor dispute, a reasonable audience would anticipate epithets, fiery rhetoric, or hyperbole. *See Leidholt v. L.F.P, Inc.*, 860 F.2d 890, 893-94 (9th Cir. 1988) (providing, by way of example, that public debates and labor disputes are instances in which a reasonable audience would expect rhetorical speech); *see also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 286 (1974) (observing that labor disputes often involve exaggerated rhetoric); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (observing that protected speech may include "vehement, caustic, and sometimes unpleasantly sharp attacks"). "Such language remains well within the realm of lusty and imaginative expressions protected by the Constitution." *Underwager*, 69 F.3d at 367. That certainly is true in this case, where the FRC's report launched a public debate about whether the fire department's budget should be cut and whether the union's political activity should be curtailed. Viewed in that specific context, Schweisinger's reference to "Jimmy Hoffa" was a loose, figurative expression of his strong disagreement with the union's activities and his support for the proposed budget cuts. *Cf. Letter Carriers*, 418 U.S. at 282 86 (holding that the defendant's use of the word "scab" as a descriptor of nonunion members was not actionable in the context of a labor dispute).

Finally, we conclude that the "Jimmy Hoffa" statement was not sufficiently susceptible of being proved

true or false, because it did not "rest on a 'core of objective evidence.' " *Underwager*, 69 F.3d at 367. Unlike the district court, we believe that not all reasonable people associate the name and persona of Jimmy Hoffa with *criminal* activity. As defendants point out, many modern-day teamsters still consider Jimmy Hoffa to be a hero who brought strength to the truckers' union and improved the welfare of truckers nationwide. *See* Jeffrey Goldberg, *Jimmy Hoffa's Revenge*, The New York Times Magazine, Feb. 8, 1998, at 42 (observing that Jimmy Hoffa is "still a hero to many modern-day teamsters"). Others might simply view Jimmy Hoffa as someone who, although not worthy of praise, was a powerful, formidable labor leader. *See id.* at 67 ("To think of Jimmy Hoffa only as a gangster who robbed his union's pension funds is to forget that he is also responsible for one of the great contracts in labor history."). Even those who respond negatively to the name "Jimmy Hoffa" may be thinking of unprovable adjectives such as "crude," "aggressive," or "demagogical," or of his fate, rather than of a fact-based trait such as "dishonesty."

In the final analysis, Schweisinger's reference to Jimmy Hoffa was the type of rhetorical hyperbole or caustic attack that a reasonable person would expect to hear in a rancorous public debate involving money, unions, and politics. Therefore, the statement could not give rise to a cognizable claim of defamation. Accordingly, we vacate the jury's verdict in favor of Gilbrook and instruct the district court to enter judgment as a matter of law in favor of Schweisinger on Gilbrook's claim of slander pe se [sic].

E. *The New Trial as to Bowler*

Defendants' final argument on appeal concerns the district court's order granting plaintiff Bowler a new trial on his retaliation claims. At the close of trial, defendants filed a Rule 50(b) motion as to Bowler's civil rights claims, on the ground that Bowler had produced no evidence showing that he had engaged in any activities protected by the First Amendment. The district court agreed with defendants' argument but, instead of entering judgment as a matter of law in favor of defendants, the district court ordered a new trial on the ground that defendants had failed to make a timely sufficiency-of-the-evidence argument as to Bowler in their Rule 50(a) motion.[13] *See Image Technical Servs., Inc. v. Eastman Kodak*

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[13] The district court decided to treat defendants' Rule 50(b) motion regarding Bowler as a motion for new trial, based on *Posadas de Mexico, S.A. de C.V. v. Dukes*, 789 F. Supp. 121 (S.D.N.Y. 1992). In that case, the court held that, "if the party moving for judgment [notwithstanding the verdict] has not moved for a directed verdict, and if the court is nevertheless satisfied that justice requires that the judgment be vacated for insufficiency of the evidence, the court should normally grant a new trial." *Id.* at 124 (citation and internal quotation marks omitted). The *Posadas* court noted that such a conversion was consistent with the Second Circuit's precedent, which permits a reviewing court to order a new trial, notwithstanding an appellant's failure to move for a directed verdict, when a jury's verdict is wholly without support. *Id.; see also Metromedia Co. v. Fugazy*, 983 F.2d 350, 362 (2d Cir. 1992) (stating that rule).

The parties have not asked us to consider whether the district court's conversion of the motion was consistent with Ninth Circuit precedent. Because we reverse the district court's decision on other grounds, we need not reach this issue. *But see Patel v. Penman*, 103 F.3d 868, 878-79 (9th Cir. 1996) (reviewing

Co., 125 F.3d 1195, 1212 (9th Cir. 1997) ("We strictly adhere to the requirements of Rule 50(b), which prohibit a party from moving for a judgment as a matter of law after the jury's verdict unless that motion was first presented at the close of evidence.").

On appeal, defendants contend that the district court erred, because they did not procedurally default their sufficiency-of-the evidence argument. We review the district court's decision for abuse of discretion. *See Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1358 (9th Cir. 1998) ("We review a decision regarding the management of litigation for abuse of discretion.").

Our review of defendants' Rule 50(a) motion supports their claim of no procedural default. First, defendants titled their Rule 50(a) motion "Memorandum of Points and Authorities in Support of Motion for Judgment as a Matter of Law By Individual Defendants Against Plaintiffs Gilbrook, Garrison, Herr, Raphael, *Bowler*, and Wilson." (Emphasis added.) Second, footnote 6 of that pleading argues clearly for a directed verdict against Bowler on the ground of lack of evidence: "As a threshold matter, Bowler produced no evidence he had done anything to trigger retaliation, for example, no evidence he had participated in any political activities or was a union officer." Finally, the body of the pleading states: "However, all of the evidence plaintiffs adduced merely suggests they were politically active firefighters

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for plain error when the appellant failed to file a motion for directed verdict in the trial court and reversing the judgment when there was no evidence to support the jury's verdict), *cert. denied*, 520 U.S. 1240 (1997).

(*except for Bowler*) who were disciplined, not that they were disciplined because they were politically active." (Emphasis added.) In the foregoing passages, defendants specifically and distinctly raised and argued in their Rule 50(a) motion that there was insufficient evidence to support Bowler's civil rights claims. We hold, therefore, that the district court erred by treating defendants' Rule 50(b) motion as to Bowler as a motion for new trial.

Having determined that defendants properly preserved their sufficiency-of-the-evidence argument regarding Bowler, we consider now (rather than later in our discussion of the cross-appeal) Bowler's claim that the district court erroneously concluded that there was insufficient evidence to establish that he had engaged in any protected activity. We review *de novo* the district court's decision that there was insufficient evidence to support the jury's verdicts as to Bowler. *See Lawson*, 139 F.3d at 692 (applying that standard of review to decisions denying or granting judgment as a matter of law). "Judgment as a matter of law is appropriate when the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, which is contrary to the jury's verdict." *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1161 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 46 (1998).

Bowler offers the following evidence to substantiate his claim that he engaged in protected activity: All firefighters, including Bowler, were union members; most, if not all, members participated in precinct-walking in support of the union's electoral efforts; and more than 600 firefighters attended two rallies in support of the union's

recall effort. Bowler points to no other evidence connecting him to any protected First Amendment activities.

We agree with the district court that Bowler failed to meet his burden of establishing that he engaged in protected activities. We find the district court's analysis to be persuasive:

> Even if Bowler was a union member, there is no evidence that every firefighter was active in the union's political affairs, much less that Bowler was. Likewise, evidence that 600 firefighters attended rallies or walked precincts does not establish – more likely than not – that Bowler was among them. As such, the jury's conclusion that Bowler participated in political speech is little more than speculation, and does not have a sufficient evidentiary basis.

For the reasons discussed, we vacate the district court's order granting defendants a new trial as to Bowler and remand with the instruction that the district court enter judgment as a matter of law in favor of defendants.

F. *Conclusion on Defendants' Main Appeal*

In summary, in defendants' main appeal, No. 96-56306, (1) we affirm the denial of defendants' Rule 50(b) motion as to Herr's and Wilson's claims of retaliation, (2) we vacate the jury's verdict in favor of Gilbrook on his state-law claim of slander per se and instruct the district court on remand to enter judgment as a matter of law in favor of defendant Schweisinger, and (3) we reverse the grant of a new trial as to Bowler's civil rights claims and instruct the district court on remand to enter judgment as a matter of law in favor of defendants.

Volume 2 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL GILBROOK; MICHAEL GARRISON; DON HERR; HAL RAPHAEL; DANA BOWLER; JOE WILSON, *Plaintiffs-Appellees,* DAVIS, RENO & COURTNEY, *Plaintiff-Intervenor-Appellee,* v. CITY OF WESTMINSTER; CHARLES V. SMITH; CRAIG SCHWEISINGER; TONY LAM; DON S. ANDERSON; JOHN T. DEMONACO; BRIAN MAYHEW, *Defendants-Appellants.*	No. 96-56306 D.C. No. CV-94-02051-RAP
PAUL GILBROOK; MICHAEL GARRISON; DON HERR; HAL RAPHAEL; DANA BOWLER; WESTMINSTER FIRE FIGHTERS ASSOCIATION, LOCAL 2425; JOE WILSON; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, *Plaintiffs-Appellants,* DAVIS, RENO & COURTNEY, *Plaintiff-Intervenor-Appellee,* v. CITY OF WESTMINSTER; CHARLES V. SMITH; CRAIG SCHWEISINGER; TONY LAM; DON S. ANDERSON; JOHN T. DEMONACO; BRIAN MAYHEW, *Defendants-Appellees.*	No. 96-56375 D.C. No. CV-94-02051-RAP

PAUL GILBROOK; MICHAEL GARRISON; DON HERR; HAL RAPHAEL; DANA BOWLER; WESTMINSTER FIRE FIGHTERS ASSOCIATION, LOCAL 2425; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO; JOE WILSON,

Plaintiffs-Appellees,

DAVIS, RENO & COURTNEY,

Plaintiff-Intervenor-Appellee,

v.

CITY OF WESTMINSTER; CHARLES V. SMITH; CRAIG SCHWEISINGER; TONY LAM; DON S. ANDERSON; JOHN T. DEMONACO; BRIAN MAYHEW,

Defendants-Appellants.

No. 97-55314

D.C. No. CV-94-02051-RAP

ORDER AMENDING OPINION AND DENYING PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC AND AMENDED OPINION

Appeals from the United States District Court
for the Central District of California
Richard A. Paez, District Judge, Presiding

Argued and Submitted
March 1, 1999 – Pasadena, California

Filed May 21, 1999
Amended July 15, 1999

Before: James R. Browning, Charles E. Wiggins, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

III. CROSS-APPEAL (NO. 96-56375)

A. *Garrison's Retaliation Claims*

On cross-appeal, we consider first plaintiff Garrison's challenge to the district court's entry of judgment as a matter of law in favor of defendants on his claims of retaliation. The district court held that Garrison's statement to the press in the wake of the fatal Candlewood Fire – "This tragedy is the direct result of the Mayor and [City] Council placing politics above the safety of the people" – was not protected speech and, therefore, could not support a claim of retaliation. The district court characterized that statement as "one that was made after a death, essentially accusing the City Council of having caused the decedent's death." Alternatively, the district court held that, even if the statement qualified as protected speech, individual defendants were "entitled to qualified immunity . . . because . . . [in] the context in which it was made, any reasonable public official would not know whether or not the statement [was] protected." We review both grounds of the district court's ruling *de novo*. *See Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1209 n. 2 (9th Cir. 1996) (so stating as to protected speech); *Ace Beverage Co. v. Lockheed Info. Mgmt. Servs.*, 144 F.3d 1218, 1219 (9th Cir. 1998) (so stating as to qualified immunity). Because the district court granted defendants' motion for judgment as a matter of law, we view the facts in the light most favorable to Garrison. *See Omega Envtl.*, 127 F.3d at 1161 (stating principle).

Our inquiry is controlled by this court's recent decision in *Brewster v. Board of Education*, 149 F.3d 971 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999). *Brewster* involved

a claim of First Amendment retaliation brought by a public-school teacher whose contract had not been renewed. In reviewing the plaintiff's claim, this court first emphasized the breadth of qualified immunity, observing that "qualified immunity provides a protection to government officers that is quite far-reaching." 149 F.3d at 977. "Public officials are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In evaluating the clarity of a right, courts "must look not to constitutional guarantees themselves but to the various doctrinal tests and standards that have been developed to implement and to administer those guarantees." *Id.*

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citation omitted); *see also Hyland v. Wonder*, 117 F.3d 405, 411-12 (9th Cir. 1997) (rejecting the argument that the district court should have granted qualified immunity because no previous Ninth Circuit case involved a comparable plaintiff; the court stated that the "Supreme Court and our case law do not require that degree of specificity").

In *Brewster*, this court went on to determine whether it was "clearly established" that the plaintiff's speech was

deserving of constitutional protection when spoken. The first part of that inquiry involves asking whether the public employee's speech addresses a matter of public concern. *See Brewster*, 149 F.3d at 978. *See generally Connick v. Myers*, 461 U.S. 138, 143-49 (1983) (discussing the public-concern inquiry). That determination must be made based on the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48 (footnote omitted). If an employee's expression relates to an issue of "political, social, or other concern to the community," as distinct from a mere personal grievance, it fairly is characterized as addressing a matter of public concern. *Id.* at 146-47; *see Brewster*, 149 F.3d at 978. An employee's motivation and the audience chosen for the speech also are relevant to the public-concern inquiry. *See Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir. 1995) (so stating).

On this record, there can be little doubt that Garrison's statement to the press in the wake of the Candlewood Fire addressed a matter of public concern: the fire department's ability to respond effectively to life-threatening emergencies. *See Burgess v. Pierce County*, 918 F.2d 104, 105-06 (9th Cir. 1990) (holding that a fire marshal's comments regarding fire safety regulations touched on a matter of public concern), abrogated on other grounds by *Johnson v. Jones*, 515 U.S. 304, 313-18 (1995); *Gillette v. Delmore*, 886 F.2d 1194, 1197-98 (9th Cir. 1989) (holding that a firefighter's statement regarding the manner in which firefighters and police had performed their duties involved a matter of public concern). We cannot agree with the district court's characterization of the statement as merely one "accusing the City Council of having

caused the decedent's death." Viewed in context, the statement conveyed far more.

Only six months earlier, the City Council had slashed the fire department's budget by laying off six firefighters and putting one fire truck out of commission. The firefighters had protested those moves when made and continued to do so by petitioning for a recall election. Garrison's statement, issued in the form of a press release, *see Roe v. City & County of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997) (observing that "public employee speech reported by the press almost by definition involves matters of public concern") (citation and internal quotation marks and citation), contributed to the union's protest, adding fuel to an already fiery public debate. The statement embodied Garrison's opinion, and the union's, that the City Council's budget cuts had undermined the fire department's ability to fight fires and to protect the lives of people in the community. As Garrison testified: "I made a statement because we had a death. A death we felt could be prevented. . . . And there was a position of public safety, and we were trying to bring that out into the community." In our view, an opinion about the preparedness of a vital public-safety institution, such as a fire department, goes to the core of what constitutes speech on matters of public concern.[14]

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[14] Defendants argue that Garrison's statement was recklessly false and, for that reason, should not be deemed to address a matter of public concern. Defendants overlook the clear law of this circuit:

> [R]ecklessly false statements are not per se unprotected by the First Amendment when they substantially relate to matters of public concern.

That Garrison's speech touched on a matter of public concern does not, however, end our inquiry. As this court noted in *Brewster*, "[t]he 'public concern' prong is a necessary, but not a sufficient, condition of constitutional protection. It merely brings the claim within the 'coverage' of the First Amendment, and thus 'ensures that a court will test the reasons for restriction against first amendment standards.' " 149 F.3d at 979 (citation omitted). The court still must conduct the balancing test articulated by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), to determine whether an employee's speech deserves constitutional protection. *See Brewster*, 149 F.3d at 979. That test entails striking "a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. "In conducting this balancing, courts must give government employers 'wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.' " *Brewster*, 149 F.3d at 979 (quoting *Connick*, 461 U.S. at 151) (citation omitted). Because the *Pickering* balance "requires a fact-sensitive, context-

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> Instead, the recklessness of the employee and the falseness of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test.

Johnson v. Multnomah County, 48 F.3d 420, 424 (9th Cir. 1995). We evaluate the recklessness of Garrison's speech in text below.

specific balancing of competing interests, the law regarding public-employee free speech claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity." *Id.* at 980 (citation and internal quotation marks omitted).

The issue before us is a narrow one: Does "the outcome of the *Pickering* balance so clearly favor[ ] [Garrison] that it would have been patently unreasonable for [defendants] to conclude that the First Amendment did not protect [Garrison's] speech"? *Id.* at 980. If it does, we must reverse; if it does not, we must affirm. On this record, we conclude that the district court erred, and we reverse.

We note at the outset that Garrison's interest in speaking out about what he and the union perceived to be a serious deficiency in fire protective services, and the public's interest in receiving such information, weigh heavily in favor of according protection to Garrison's speech. Indeed, firefighters, such as Garrison, are members of the community who are most likely to be informed and have definite opinions about the sufficiency of firefighting services. *See Pickering*, 391 U.S. at 572 (making a similar observation about teachers); *Kannisto v. City & County of San Francisco*, 541 F.2d 841, 843 (9th Cir. 1976) (making a similar observation about police officers). Moreover, the "more tightly the First Amendment embraces the speech," the stronger the showing of workplace disruption must be. *Johnson v. Multnomah County*, 48 F.3d at 426 (citation and internal quotation marks omitted); *see also Connick*, 461 U.S. at 152 (cautioning that "a stronger showing [of disruption] may be necessary if the employee's speech more substantially

involved matters of public concern"). Here, as noted, Garrison's expression lies at the core of speech on matters of public concern. Thus, defendants' showing of disruption, real or potential, must be correspondingly greater.

In balancing the competing interests, this court has considered a host of factors. We have inquired whether the speech (1) impaired discipline or control by superiors; (2) disrupted co-worker relations; (3) eroded a close working relationship premised on personal loyalty and confidentiality; (4) interfered with the speaker's performance of his or her duties; or (5) obstructed routine office operations. *See Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1331 n.1 (9th Cir. 1997) (citing those factors), *cert. denied*, 118 S. Ct. 1517 (1998). "[P]ublic employers need not allege that an employee's expression actually disrupted the workplace; 'reasonable predictions of disruption' are sufficient." *Brewster*, 149 F.3d at 979 (quoting *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion)). Moreover, this court has weighed (6) whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague, *id.* at 981; (7) whether the speaker served in a high-level, policy-making capacity; and (8) whether the statement was false or made with reckless disregard of the truth, *see Moran v. Washington*, 147 F.3d 839, 849-50 (9th Cir. 1998) (considering those last two factors). Because the *Pickering* balance necessarily involves a fact-sensitive inquiry involving the totality of the circumstances, no single factor is dispositive.

Most of the foregoing factors weigh in favor of Garrison. First, he directed his statement, through the press, to the citizens of Westminster, not to another firefighter.

"[W]e have acknowledged that a 'narrow, limited focus and [a] limited audience weigh against [a] claim of protected speech.' " *Brewster*, 149 F.3d at 981 (quoting *Roe*, 109 F.3d at 585). Furthermore, Garrison did not occupy a high-level, policy-making position, for which personal loyalty and confidentiality are indispensable. Were he in such a job, the City's interest in avoiding disruption would be enhanced. *See Moran*, 147 F.3d at 850 (making that observation with respect to employees who occupy a "confidential, policymaking, or public contact role") (citation and internal quotation marks omitted). Finally, there is no evidence in the record suggesting that Garrison's statement affected his own duties, impaired a close working relationship, obstructed routine office operations, or threatened to have any such negative consequence. *Cf. Nunez v. Davis*, 169 F.3d 1222, 1228-29 (9th Cir. 1999) (holding that the plaintiff's interest in exercising her right to speech clearly outweighed the employer's interest in maintaining an efficient workplace, when the jury found that the assertion of office disruption was not credible and the other reasons offered for termination were pretextual).

Defendants argue that two factors weigh against Garrison. First, defendants claim that Garrison made his statement with reckless disregard for the truth. *See Johnson v. Multnomah County*, 48 F.3d at 424 (holding that recklessness of expression may be considered in the *Pickering* balance, but that the public employer must make a showing of actual injury). On this record, we disagree.

It is true that Garrison issued the press release only about 15 to 17 hours after the fire, without firm knowledge of the time or cause of the victim's death. Investigators were still at the scene, and an autopsy of the victim had yet to be performed. However, Garrison's actions hardly can be characterized as reckless. Garrison learned about the Candlewood Fire from plaintiff Raphael, who was the battalion chief at the scene and a 23-year veteran firefighter. On the night of the fire and the following morning, Raphael told Garrison extensive details of the tragedy from his firsthand knowledge and expressed a belief based on his experience that, had the firefighters had an extra truck at the scene, the death could have been prevented. Raphael informed Garrison that a neighbor had heard screaming and moaning coming from the house as the firefighters were making their entry. The following morning, Garrison also consulted with two other firefighters, who had been inside the house, to verify Raphael's account. Garrison then discussed the fire with the members of the union's executive board, each of whom agreed that a press release should issue. Garrison's repeated inquiries and consultations with professionals at the scene and with other firefighters before issuing the press release belies defendants' claim that he acted with reckless disregard for the truth.

Second, defendants claim that, although there is no evidence of *actual* disruption in the provision of fire services, it was reasonable for defendants to believe that Garrison's statement could have eroded the morale and the effectiveness of a fire department already embroiled in a political battle and beset by accusations of corruption. We are mindful that a public-safety organization,

such as a fire department, has a "substantial interest in developing 'discipline, *esprit de corps*, and uniformity, to insure adequate 'promotion of safety of persons and property.' " *Kannisto*, 541 F.2d at 843 (making that observation as to a police department) (quoting *Kelley v. Johnson*, 425 U.S. 238, 246-47 (1976)). Nevertheless, we are unpersuaded that such a prediction of disruption was reasonable in the unusual circumstances of this case. The statement at issue in no way criticized the abilities of fellow firefighters or accused them of any wrongdoing, *see, e.g., Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 26 (2d Cir. 1979) (involving allegations that the fire department had engaged in a "cover-up" to hide accounting irregularities; the district court had found that those accusations were a product of the plaintiff's "resentment" and "bitterness" toward senior officers of the fire department), nor did it pose any threat to internal discipline or to the chain of command, *see, e.g., Kannisto*, 541 F.2d at 842-44 (involving disrespectful and disparaging remarks about a superior officer made to subordinates during a morning inspection); *Shands v. City of Kennett*, 993 F.2d 1337, 1345 (8th Cir. 1993) (involving statements about the quality of firefighting equipment and the need to hire a firefighter with specific qualifications; the court held that making those statements threatened "to undermine the chief's authority" and "circumvented the chain of command"). As defendant Demonaco conceded, the morale of firefighters already was badly damaged because of the budget cuts and the public accusations of corruption. In such circumstances, Garrison's statement could have had, at most, a marginal

impact on the firefighters' morale. Such a nominal showing of potential disruption is plainly inadequate to outweigh the heavy interests (1) of Garrison in speaking about the lack of readiness of the fire department and (2) of the citizens of Westminster in receiving such information.

Defendants additionally claim that Garrison's right to expression could not have been "clearly established," because his statement had the potential to expose the City to civil liability. Demonaco testified that he had thought that Garrison's statement was a "great libelous situation" that could have cost the taxpayers "a great deal of money." The district court relied on that factor; commenting on Garrison's statement, the district court stated, "If that is not pinning liability on the city, I don't know what it is."

On the facts of this case, defendants' claim that Garrison's statement could have exposed the City to liability falls short of the mark. As discussed, Garrison was responsible, not reckless, in issuing the Candlewood Fire press release. Moreover, defendants produced no evidence that Garrison's statement resulted in any actual injury to the City. *See Johnson v. Multnomah County*, 48 F.3d at 424 (stating that, in the *Pickering* balance, courts may consider the "*actual damage* done to the government by the reckless statement") (emphasis added). The danger in lowering the bar of protection for true or nonreckless speech that merely *might* expose a public employer to liability is that it "may inhibit the flow of accurate information from public employees who are uncertain about whether they have accumulated a legally sufficient factual basis for their statements." *Id.* Indeed, this court has

recognized that there is a significant First Amendment interest in encouraging public employees, who are positioned uniquely to contribute to the debate on matters of public concern, to speak out about what they think and know without fear of retribution, so that citizens may be informed about the instruments of self-governance. *See, e.g., id.* We conclude that the concern-over-liability factor does not weigh against Garrison in the *Pickering* balance.

Finally, we address a variable that is not part of the traditional *Pickering* balance, but that defendants have raised here: reliance on counsel. Both Demonaco and Huntley testified that they consulted with counsel before discharging Garrison because of his press release. Huntley even went so far as to read a Supreme Court opinion himself, before determining that Garrison had exceeded the permissible bounds of protected public-employee speech. Although such efforts are laudable, standing alone they do not bestow on public officials the shield of qualified immunity. *See Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990) ("While *reliance on counsel's advice will not satisfy a defendant's burden of acting reasonably*, it is evidence of defendant's good faith.") (emphasis added); *see also Nunez*, 169 F.3d at 1230 (holding that advice of counsel is not dispositive on the issue of reasonableness). Were we to rule that reliance on the advice of counsel is sufficient to confer qualified immunity, no matter what the outcome of the *Pickering* balance, we would be abdicating to individual lawyers our collective judicial responsibility to evaluate the merits of First Amendment retaliation claims and providing an incentive for lawyers to tell public-employer clients that they have immunity even when other factors suggest the absence of immunity.

In summary, on the record before us, we conclude that the *Pickering* balance so clearly weighs in favor of Garrison that it was patently unreasonable for defendants to conclude that the First Amendment did not protect his speech. Accordingly, we reverse the district court's grant of defendants' Rule 50(a) motion as to Garrison's retaliation claims and remand those claims for further proceedings.

B. *Equal Protection Claims*

1. *Grant of Defendants' Rule 50(b) Motion*[15]

The jury found that certain defendants (Demonaco, Anderson, Smith, Schweisinger, Lam, and Mayhew) were liable for denying plaintiffs Herr, Wilson, Bowler, and Raphael equal protection of the law, in violation of the Fourteenth Amendment. However, after trial, the district court granted defendants' Rule 50(b) motion as to those claims on the ground that there was insufficient evidence of an equal protection violation. Specifically, the district court held that there was insufficient evidence from which the jury could compare the class of plaintiffs to a class of similarly situated nonplaintiffs.

Having conducted a *de novo* review of the record, *see Lawson*, 139 F.3d at 692 (stating that standard of review),

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[15] Garrison's equal protection claim was not before the district court as part of defendants' Rule 50(b) motion, because the district court already had dismissed his claim at the close of plaintiffs' case-in-chief. We consider the merits of Garrison's equal protection claim in this section, however, because it involves the same legal issues that are raised in connection with the grant of defendants' Rule 50(b) motion.

we agree with the district court that plaintiffs failed to produce legally sufficient evidence to support their equal protection claims. Consequently, we do not address the more interesting (and difficult) legal question posed by defendants: Can differential treatment on the basis of expressive activity give rise to an equal protection claim, separate and apart from a claim of First Amendment retaliation?[16]

"The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike." *Plyer v. Doe*, 457 U.S. 202, 216 (1982) (citation and internal quotation marks omitted); *see also Milikotin v. City of Los Angeles*, 643 F.2d 652, 654 (9th Cir. 1981) (stating that the allegation of "unequal treatment of persons similarly situated . . . [is] the gravamen of a complaint for denial of equal protection"). Plaintiffs identified as the class of

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[16] Other courts have split on that question. *Compare Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997) (holding that no independent equal protection claim exists when the plaintiff has done no more than restate his or her claim of retaliation as a claim of equal protection), *Thompson v. City of Starkville*, 901 F.2d 456, 468 (5th Cir. 1990) (same), *Vukadinovich v. Bartels*, 853 F.2d 1387, 1391-92 (7th Cir. 1988) (same), and *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1296 n.8 (7th Cir. 1996) (suggesting, in *dictum*, that no independent equal protection claim exists), *cert. denied*, 117 S. Ct. 1822 (1997), *with Gehl Group v. Koby*, 63 F.3d 1528, 1538 (10th Cir. 1995) (observing that a civil claim of selective prosecution based on protected speech "could implicate equal protection concerns, just as it could First Amendment concerns"). *See also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-96 (1972) (analyzing under the Equal Protection Clause a picketing ordinance that, on its face, differentiated between similarly situated groups based on the subject matter of the group's expression).

similarly situated persons those nonplaintiff firefighters whom the City had not terminated for violating the PTF policy and who were less politically active than plaintiffs. In other words, plaintiffs claimed that the City disciplined them more harshly than it disciplined policy-violating firefighters who had engaged in less First Amendment activity.

Other than general evidence that many firefighters had attended rallies, had walked precincts, and had distributed petitions, there was no evidence fixing the specific level of First Amendment activity engaged in by nonplaintiff firefighters. Plaintiffs argue that the jury could *infer* that other firefighters were less active in the union's political battles, simply because they did not figure prominently in the testimony. Such an inference from lack of evidence would amount to no more than speculation, however. The burden was on plaintiffs to produce affirmative proof that other firefighters were less active politically and, because of that inactivity, received favorable treatment. *See Gehl Group v. Koby*, 63 F.3d 1528, 1538 & n.14 (10th Cir. 1995) (holding that, in a civil rights claim for selective prosecution, the burden of proof rests on plaintiffs to show (1) that the defendant singled them out for prosecution while other similarly situated groups were not for equivalent conduct and (2) that the discriminatory selection was invidious and based on the plaintiffs' exercise of First Amendment rights). Accordingly, there was no legally sufficient evidence in the record to support the jury's verdicts in favor of plaintiffs on their equal protection claims. The district court did not err in granting defendants' Rule 50(b) motion.

2. *Exclusion of Evidence*

Plaintiffs further argue that, if there was insufficient evidence to support the jury's verdict on their equal protection claims, then the district court was to blame. That is so, plaintiffs contend, because the district court erroneously refused to admit evidence regarding certain other firefighters. Because of that alleged error, plaintiffs demand a new trial.

We have reviewed the record and the alleged instances of evidentiary error. In none of those instances did plaintiffs offer evidence that would have cured the fatal deficiency of their case: the lack of evidence regarding the types and levels of protected activities engaged in by nonplaintiff firefighters, whom the City disciplined but did not fire. Even if the district court did commit the evidentiary errors asserted by plaintiffs, none of those errors was prejudicial so as to warrant a new trial, nor were they prejudicial in combination. *See Heyne*, 69 F.3d at 1478 (holding that, in the absence of prejudice, a new trial is not warranted).

3. *Jury Instruction on Equal Protection*

Last, plaintiffs argue that a new trial is warranted as to plaintiff Gilbrook, whose equal protection claim the jury rejected on the facts, because the district court admitted that its jury instruction on equal protection was erroneous and prejudicial. However, as discussed, there was legally insufficient evidence to support *any* of plaintiffs' equal protection claims. A proper jury instruction would not have cured that deficiency.

C. *Conclusion on Plaintiffs' Cross-Appeal*

In summary, in plaintiffs' cross-appeal, No. 96-56375, (1) we reverse the grant of defendants' Rule 50(a) motion as to Garrison's retaliation claims and remand those claims for further proceedings, and (2) we affirm the entry of judgment as a matter of law in favor of defendants as to all plaintiffs' equal protection claims.

IV. THE FEE APPEAL (NO. 97-55314)

As the only "prevailing parties" under 42 U.S.C. § 1988,[17] plaintiffs Herr and Wilson moved for attorney fees and costs pursuant to that statute. The district court granted plaintiffs' motion, awarding reasonable attorney fees and costs directly to Herr and Wilson in the sum of $977,166.68. However, instead of assigning that award to their trial lawyers, Davis, Reno & Courtney (intervenor), who earlier had withdrawn as counsel because of unpaid fees, Herr and Wilson kept the award on the advice of their appellate counsel.

Before us now are two matters relating to the district court's award of fees and costs. First, defendants appeal from the district court's judgment as to fees and costs, contesting the amounts awarded to Herr and Wilson. Second, intervenor argues that the district court erred by awarding the fees and costs directly to Herr and Wilson

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[17] For purposes of § 1988, a civil rights plaintiff "prevails" "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992).

rather than to intervenor. We turn first to intervenor's sole assignment of error and then consider defendants' various arguments concerning the reasonableness of the fee award.

A. *Entitlement to the Fee Award*

Intervenor asserts that, although the district court properly granted plaintiffs' motion for attorney fees and costs, the district court erred by ordering payment of that award directly to plaintiffs, instead of directly to counsel. Intervenor argues that, under the logic of this court's decision in *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc.*, 89 F.3d 574 (9th Cir. 1996), the payment of attorney fees awarded under § 1988 must be made directly to the plaintiff's counsel. To hold otherwise, intervenor reasons, would frustrate the underlying purpose of § 1988: to encourage private enforcement of the civil rights laws. We review *de novo* a district court's interpretation of a fee-shifting statute. *See id.* at 576 (stating that standard of review).

We begin our analysis, as always, with the words of the statute. Section 1988 provides that "the court, in its discretion, may allow the *prevailing party* . . . a reasonable attorney's fee" in actions brought pursuant to certain enumerated civil rights statutes, including the relevant statute in this case, § 1983. 42 U.S.C. § 1988 (emphasis added). The emphasized wording suggests that a fee is allowed to the party, rather than to the party's lawyer.

Additionally, two Supreme Court decisions inform our interpretation of § 1988. In *Evans v. Jeff D.*, 475 U.S. 717 (1986), the Court held that attorney fees under § 1988

may be waived as part of a civil rights class action settlement. In so holding, the Court observed that "the language of [§ 1988], as well as its legislative history, indicates that Congress bestowed on the 'prevailing *party*' (generally plaintiffs) a statutory eligibility for a discretionary award of attorney's fees in specified civil rights actions." *Id.* at 730 (footnote omitted) (emphasis in original). The Court further stated that,

> while it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, *it neither bestowed fee awards upon attorneys* nor rendered them nonwaivable or nonnegotiable; instead, it added them to the arsenal of remedies available to combat violations of civil rights, a goal not invariably inconsistent with conditioning settlement on the merits on a waiver of statutory attorney's fees.

Id. at 731-32 (footnotes omitted) (emphasis added); *see also Willard v. City of Los Angeles*, 803 F.2d 526, 527 (9th Cir. 1986) (holding, in the light of *Jeff D.*, that "an attorney has no standing under section 1988 to seek attorney's fees in his own behalf").

A few years later, in *Venegas v. Mitchell*, 495 U.S. 82 (1990), the Supreme Court reaffirmed its view that it is the civil rights plaintiff, not the civil rights lawyer, who is entitled to a fee award under § 1988. *Venegas* dealt with the question whether § 1988 invalidated "contingent-fee contracts that would require a prevailing civil rights plaintiff to pay his attorney more than the statutory award against the defendant." *Id.* at 83-84 (footnote omitted). In holding that such private fee arrangements were

consistent with § 1988, *see id.* at 90 (stating holding), the Court observed that *"it is the party, rather than the lawyer"* who is eligible for fees under the statute. *Id.* at 87 (emphasis added). The Court further commented that, "just as we have recognized that it is the party's entitlement to receive the fees in the appropriate case, so have we recognized that as far as § 1988 is concerned, it is the party's right to waive, settle, or negotiate that eligibility." *Id.* at 88.

Despite the precedent holding that only the civil rights plaintiff is entitled to receive fees under § 1988, intervenor insists that, once awarded, the payment of such fees should be made directly to the plaintiff's counsel. Intervenor relies mainly on *Virani* to support its claim. In that case, this court addressed the same question posed here, but with respect to a *qui tam* action under the False Claims Act (FCA), which also provides for an award of attorney fees to successful plaintiffs. *See* 31 U.S.C. § 3730(d)(1). Although a unanimous panel agreed that, *on the facts of the case*, the attorney fee award had to go directly to the plaintiff's lawyers, only two members of the panel concurred in the holding that, *in all circumstances*, the payment of fees under the FCA must be made directly to the plaintiff's counsel. The two-judge majority reasoned:

> [O]nly the plaintiff has the power to demand that the defendant pay the fees of the plaintiff's attorney. Unless and until the plaintiff exercises that power, no one has the right to collect fees from the defendant, and the defendant has no duty to pay them. Once the power is exercised, however, the attorneys' right vests, and the defendant's duty becomes fixed. The work was

> done by and the fees are for the plaintiff's attorney. They must be directed to the attorney. Were the rule otherwise, plaintiffs would obtain possession of fee awards, and attorneys would be left to attempt to obtain the money paid for their services as best they could. Left to the normal vicissitudes of life, substantial sums would be diverted from their intended purpose.

Virani, 89 F.3d at 578-79 (footnotes and citation).

In a concurrence, Judge Thomas advocated a different interpretation of the fee-shifting provision of the FCA. He wrote that the "clear import of case law is that (1) statutory attorneys' fee awards are bestowed upon the party, not the attorney and (2) such awards are separate and distinct from the contractual relationship between the attorney and client." *Id.* at 581 (Thomas, J., concurring) (footnote omitted). He concluded that, "absent a contractual assignment to the attorney, the False Claims Act requires payment of the attorneys' fee award to the party, with the ultimate disposition of the award dependent upon the contract between the attorney and client." *Id.* at 580 (Thomas, J., concurring). Judge Thomas concurred with the majority's result because the parties had entered into a retainer agreement, which provided that the attorney would be assigned all fees and costs awarded by the court.

Intervenor contends that the *Virani* majority's rationale applies equally to fee awards under § 1988. *Cf. Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980) ("Congress' purpose in authorizing fee awards [under § 1988] was to encourage compliance with and enforcement of the civil rights laws.") (footnote omitted). We conclude,

however, that the majority's rationale in *Virani* does not apply to all federal fee-shifting statutes and, in particular, does not apply to fee awards under § 1988.

In *Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354 (9th Cir. 1998), this court considered whether attorney fees awarded under the Clayton Act's fee-shifting provision, 15 U.S.C. § 15(a), should be paid directly to the successful party's counsel or to the successful party itself. The court held that "[a]ny fee award in an antitrust case goes to the successful plaintiff, not to plaintiff's counsel." *Id.* at 1357. In so holding, this court rejected the application of the *Virani* majority's rationale to the Clayton Act, noting that Judge Thomas' concurrence in *Virani* "adheres to reasoning closer to that found in antitrust fee cases." *Id.* at 1359. The same, we think, is true of fees awarded under § 1988.

There are significant differences between a fee award under § 1988 and a fee award in a *qui tam* action. First, the Supreme Court of the United States has spoken with respect to fees under § 1988. As the Court said unequivocally in *Jeff D.*, Congress chose not to "bestow[ ] fee awards upon attorneys." 475 U.S. at 731-32. No policy argument and no Ninth Circuit case can override the Supreme Court's interpretation.

Second, the functional difference between a civil rights claim and a *qui tam* action suggests that a different result is appropriate. In the latter type of action, a substantial portion of the damages collected goes to the federal government, not to the *qui tam* plaintiff, as compensation for the acts of fraud committed by the defendant against the federal government. *See Virani*, 89 F.3d at

578 (so noting). Thus, as discussed in *Virani*, it is particularly important in *qui tam* actions that attorney fees actually go to the *qui tam* lawyer and not to the *qui tam* plaintiff. If they did not, the government would be denied compensation to which it otherwise would be entitled. *Id.* That governmental-harm concern simply is not present in individual civil rights actions.

Third, even if we were free to consider policy concerns, denying civil rights lawyers a direct payment of fee awards is consistent with § 1988's purpose of attracting competent counsel to represent civil rights plaintiffs. As the Court said in *Venegas*, civil rights lawyers can protect their interest in a fee award simply by executing contracts. *See* 495 U.S. at 90 ("Section 1988 itself does not interfere with the enforceability of a contingent-fee contract.").

In short, we think that Judge Thomas' view of federal fee-shifting statutes better reflects the wording of § 1988 and the authorities interpreting that statute. In the absence of a contractual assignment to counsel, § 1988 requires that attorney fee awards be made directly to the prevailing party, with the ultimate disposition of the award dependent on the contract between the lawyer and the client.

Here, Herr and Wilson did not enter into a retainer agreement with intervenor providing that any monies awarded to plaintiffs as "prevailing parties" under § 1988 would be assigned to intervenor. Accordingly, the district court did not err by awarding attorney fees and costs directly to Herr and Wilson.

B. *Reasonableness of Fees*

We turn next to defendants' challenges to several aspects of the district court's award of fees and costs. "While awards of attorney's fees pursuant to 42 U.S.C. § 1988 are generally reviewed for abuse of discretion, any elements of legal analysis and statutory interpretation which figure in the district court's decision are reviewable *de novo*." *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991) (citations and internal quotation marks omitted).

1. *Fees for Activities Related to the OCFA*

Defendants first object to that portion of the fee award compensating plaintiffs for intervenor's various efforts related to the City's contracting out of fire services to the OCFA. The relevant facts are not in dispute.

Shortly before trial, the City decided to disband the fire department. The City executed a contract with the OCFA to provide fire services to the community. Plaintiffs claimed that the decision was in furtherance of defendants' conspiracy to retaliate against plaintiffs. Additionally, the OCFA contract contained a clause precluding anyone who had been discharged by the City's fire department from obtaining work with the OCFA. That provision affected the employment eligibility of four plaintiffs – Garrison, Gilbrook, Herr, and Raphael – each of whom the City had terminated. Intervenor's billing records show that, from May 1995 through July 1995, intervenor engaged in negotiations with defendants to settle the civil rights claims of the terminated plaintiffs and to secure their employment eligibility with the

OCFA. A federal magistrate judge acted as mediator in those negotiations. When those efforts failed, plaintiffs sought a temporary restraining order (TRO) to enjoin enforcement of the City's contract with the OCFA. The trial judge heard that motion and granted it, but then denied plaintiffs' request for a preliminary injunction. Plaintiffs then sought a second TRO, which the district court denied.

In ruling on plaintiffs' motion for fees, the district court held that, under *Cabrales*, intervenor's *litigation* efforts relating to the OCFA were compensable, because they constituted "[e]fforts to preserve the remedy of reinstatement and efforts to encourage settlement in the case [which], though ineffective, contributed to the ultimate success in the lawsuit." Moreover, relying on *Davis v. City & County of San Francisco*, 976 F.2d 1536 (1992), *vacated in part on other grounds on denial of reh'g*, 984 F.2d 345 (9th Cir. 1993), the district court held that intervenor's *extra-litigation* efforts involving the OCFA were compensable for another reason, because they "directly and intimately related to protecting reinstatement as a remedy and encouraging settlement." *See id.*, 976 F.2d at 1545 (holding that prevailing civil rights counsel are entitled to compensation for work that is "directly and intimately related to the successful representation of a client").

Defendants attack several aspects of the OCFA-related fee award. First, defendants argue that the district court misapplied *Cabrales*, because intervenor's efforts to enjoin the enforcement of the City's contract for fire services with the OCFA were "wholly collateral" to plaintiffs' ultimate victory. Moreover, defendants complain that the district court misapplied *Davis*, because certain of

the OCFA related fees involved nonlitigation efforts that did not contribute, directly and substantially, to the attainment of plaintiffs' litigation goals. Finally, defendants claim that the OCFA-related fees should be vacated or, alternatively, reduced, because an actual conflict of interest tainted intervenor's representation of plaintiffs. We consider each argument in turn.

Cabrales involved the question whether a prevailing plaintiff is entitled to attorney fees incurred during an unsuccessful stage of the same litigation. This court held that "a plaintiff who is unsuccessful at a stage of a litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage." 935 F.2d at 1053. In so holding, this court observed that "[l]awsuits usually involve many reasonably disputed issues and a lawyer who takes on only those battles he is certain of winning is probably not serving his client vigorously enough; losing is a part of winning." *Id.* In view of that reality, the court acknowledged that, as a general rule, "plaintiffs are to be compensated for attorney's fees incurred for services that contribute to the ultimate victory in the lawsuit." *Id.* at 1052.

The district court ruled that the hours spent by intervenor opposing the OCFA contract contributed to the ultimate success of the lawsuit, because they preserved the remedy of reinstatement and encouraged settlement of the case. Deference to the district court's awarding of fees is "appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). That principle is particularly applicable here,

where the trial judge presided ably over every aspect of this litigation, from the filing of the complaint to the post-trial motions. He was intimately familiar with the facts, the issues, and the parties' efforts. Defendants have pointed to nothing in the record that convinces us that intervenor's OCFA-related litigation efforts were "wholly collateral" to the present action. We, therefore, do not disturb that portion of the fee award.

Defendants next object to a minor portion of the fee award, totaling less than $500, which compensates plaintiffs for work relating to the OCFA's physical examination requirements and the retirement benefits available to OCFA firefighters. The district court held that, under *Davis*, such work was compensable, because it constituted extra-litigation efforts directly and intimately related to protecting reinstatement as a remedy and encouraging settlement. Plaintiffs explain that the contested hours were necessary to determine whether reinstatement was a workable remedy: If plaintiffs could not meet the physical examination requirements or if the retirement benefits were less than satisfactory, reinstatement might not have been a beneficial option to pursue. Once again, because of the district court's intimate familiarity with this litigation, as well as with the factors that led to plaintiffs' ultimate success, we defer to the district court's discretion on this matter.

Finally, defendants argue for the first time on appeal that the fee award should be vacated or reduced, because intervenor provided legal services to plaintiffs under an actual conflict of interest. Defendants assert that the conflict issue is purely an issue of law, which may be reviewed for the first time on appeal. *See United States v.*

Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990) (stating that an issue may be heard for the first time on appeal when "the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court"). We do not agree.

A claim of conflict of interest on the part of counsel is a mixed question of fact and law. *See Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994) (stating the standard of review for claims of conflict of interest on habeas review). Ordinarily, we would review the district court's findings of fact deferentially, for clear error. Here, however, because defendants have raised the conflict question for the first time on appeal, neither plaintiffs nor the district court had an opportunity to develop the record regarding the alleged conflict. We, therefore, decline to consider defendants' conflict-of-interest argument.

2. *Press Releases and Public Relations Activities*

Next, defendants challenge approximately 25 hours of time billed by intervenor for media and public relations activities. Prevailing civil rights counsel are entitled to fees for "press conferences and performance of other lobbying and public relations work" when those efforts are "directly and intimately related to the successful representation of a client." *Davis*, 976 F.2d at 1545.

Here, the district court determined that intervenor's work contributed directly and substantially to plaintiffs' litigation goals. The district court reasoned that "[l]ocal politics had a potentially determinative influence on the outcome of settlement negotiations and the availability of certain remedies such as reinstatement." The district

court further stated that "plaintiffs believed the efforts to disband the Westminster Fire Department were part of the retaliatory scheme, and plaintiffs reasonably used public relations and political lobbying efforts to prevent additional retaliation against plaintiffs prior to the conclusion of this action."

After a review of the relevant billing records, we conclude that the district court did not abuse its discretion by granting fees for media and public relations activities insofar as those activities contributed directly and substantially to plaintiffs' attainment of favorable jury verdicts. The hours spent by intervenor publicizing those verdicts were not compensable, however. *See id.* (suggesting that, on remand, the district court disallow fees for media appearances made by counsel after the attainment of the plaintiff's litigation goals). Therefore, on remand the district court must deduct from the fee award those hours devoted to post-verdict media activities.

C. *The Absence of a Fee Agreement*

At long last, we reach the final issue. Defendants assert that a "special circumstance" exists in this case, warranting a remand to the district court for reconsideration of the fee award. Specifically, defendants contend that they learned for the first time on appeal that intervenor "had no written fee agreement, in fact no agreement at all, with Herr and Wilson, in violation of California law." That "special circumstance," defendants claim, justifies vacating the fee award and directing the trial court to recalculate the award according to the hourly fees that intervenor actually charged to plaintiffs,

not what the district court deemed to be a reasonable fee.[18]

As a threshold matter, we assume, without deciding, that defendants did not waive this argument of law by failing to raise it before the district court. Defendants' "special circumstances" claim is unpersuasive.

The "special circumstance" exception derives from *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1989). There, the Supreme Court observed that the prevailing party in civil rights actions "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402. This court has examined two factors in determining whether a case involves a "special circumstance" justifying the denial of fees: (1) whether allowing attorney fees would further the purposes of § 1988 and (2) whether the balance of the equities favors or disfavors the denial of fees. *See Seattle Sch. Dist. v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982). Defendants do not seriously contend, nor can they, that the award of fees in this case

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[18] In its discretion, the district court calculated the attorney fee award using an hourly rate higher than that actually charged by intervenor. *See Blanchard v. Bergeron*, 489 U.S. 87, 92 (1989) ("Whether or not [a litigant] agreed to pay a fee and in what amount is not decisive [to determining a fee award]. . . . Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agree but what is reasonable.") (citation and internal quotation marks omitted). Defendants have not challenged the district court's use of a higher hourly rate except insofar as they make the "special circumstances" argument. That is, they never have argued that the hourly rate is unreasonable.

undermines the purposes of § 1988. Rather, they argue that, in the absence of a retainer agreement, it was inequitable for the district court to calculate the fee award using a "reasonable" hourly rate that was higher than the rate that intervenor actually charged.

In answering defendants' argument, *Virani* is instructive. There, the defendant challenged the award of attorney fees on the ground that counsel had entered into an unconscionable fee agreement with the plaintiff. This court held:

> When that kind of claim has been made, California courts have not denied fees in their entirety. They have simply refused to enforce the improper agreement itself. Nevertheless, attorneys were still allowed to recover the reasonable value of their services.
>
> In light of California law, even if there were some impropriety in the fee arrangement between [counsel] and [the plaintiff], [the defendant] cannot prevail. [Counsel] would still be entitled to recover the reasonable value of its services, and that is all [the defendant] has been required to pay. We appreciate [the defendant's] concern that [the plaintiff] be treated fairly when attorneys enter into fee arrangements with him, but, again, that does not affect the amount of the fee which it must pay.

89 F.3d at 580 (citations omitted).

As in *Virani*, defendant has accused intervenor of no more than an unlawful fee arrangement with plaintiffs, indeed, no fee arrangement at all. In that circumstance, even assuming intervenor's conduct to be improper (which is not at all clear), plaintiffs Herr and Wilson still

would be entitled to the reasonable value of their lawyers' services under California law. That is what they received.

CONCLUSION

Our holdings, in summary form, are as follows:

1. In defendants' main appeal, No. 96-56306, the denial of defendants' Rule 50(b) motion as to plaintiff Herr's and plaintiff Wilson's claims of retaliation is **AFFIRMED**; the verdict in favor of plaintiff Gilbrook on his state-law claim of slander per se is **VACATED AND REMANDED WITH INSTRUCTIONS TO ENTER JUDGMENT FOR DEFENDANT Schweisinger**; the order granting a new trial as to plaintiff Bowler's claims of retaliation is **REVERSED AND REMANDED WITH INSTRUCTIONS TO ENTER JUDGMENT FOR DEFENDANTS.**

2. In plaintiffs' cross-appeal, No. 96-56375, the grant of defendants' Rule 50(a) motion as to plaintiff Garrison's claims of retaliation is **REVERSED AND THOSE CLAIMS ARE REMANDED FOR FURTHER PROCEEDINGS**; the grant of defendants' Rule 50(b) motion as to plaintiffs' equal protection claims is **AFFIRMED**; the grant of defendants' Rule 50(a) motion as to plaintiff Garrison's equal protection claim is **AFFIRMED**.

3. In defendants' fee appeal, No. 97-55314, the award of attorney fees and costs directly to plaintiff Herr and plaintiff Wilson is **REVERSED** insofar as it awards fees for intervenor's post-verdict media and public relations activities and is **OTHERWISE AFFIRMED**.

Each party will bear its own costs on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL GILBROOK, et al., Plaintiffs, v. CITY OF WESTMINSTER, et al., Defendants.	CASE NO. CV 94-2051 RAP (VAP) ORDER ON DEFENDANTS' MOTIONS FOR JUDGMENT AS MATTER OF LAW (Fed. R. Civ. P. 50(b)) AND FOR A NEW TRIAL (Fed. R. Civ. P. 59) (Filed Jul. 17, 1996)

I.

Introduction[1]

This civil rights action arises out of the turbulent relationship between certain elected officials of the City of Westminster[2] and the Westminster City Firefighters Association and its members. The gravamen of plaintiffs' claims raised in this action was that plaintiffs were unconstitutionally disciplined in retaliation for mounting

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[1] The facts of this case are well known to the Court and the parties, and are therefore not recited here.

[2] Defendants include the City of Westminster, as well as the following present and former city officials: Charles V. Smith (Mayor), Craig Schweisinger (City Counsel member), Charmayne Bohman (City Counsel member), Tony Lam (City Counsel member), Jerry Kenny (City Manager), Robert J. Huntley (Interim City Manager), Don S. Anderson (Assistant City Manager), John T. Demonaco (Fire Chief), Richard Jones (City Attorney) and Brain Mayhew (City's Finance Director).

a recall election against several city counsel members and then actively campaigning against defendants during the recall election. Plaintiffs claim defendants' conduct violated their First and Fourteenth Amendment rights and that defendants slandered plaintiff Gilbrook.

The case was divided into two separate trials: Plaintiff Gilbrook's, Garrison's, Herr's, Rapheal's [sic], Wilson's and Bowler's claims were tried first.[3] This first trial was conducted in three phases: liability, damages, and *Monell* liability, respectively. In the first two phases, the jury imposed liability on defendants Smith, Schweisinger, Lam, Anderson, Demonaco and Mayhew. Plaintiffs were awarded both compensatory and punitive damages. The Court then found the City liable under *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018 (1978).

This matter is now before the Court on defendants' post-trial motions pursuant to Fed. R. Civ. P. Rules 50(b) and 59. Defendants request the Court to enter a judgment as a matter of law, notwithstanding the jury's verdicts. In the alternative, defendants seek a new trial. The Court held a hearing on these motions on January 16, 1996, and requested supplemental briefing, the last of which was submitted February 13, 1996.

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[3] At the time of the first trial, the other plaintiffs included Binks, Blain, Garland, Jones, Kolb, Kungle, Long, Macpherson, Metzer, Mitchell, Nelson, Pasternak, Purcell, Reese, Richards, Speth, Surkin, and Wilkinson. Since that time, certain of these plaintiffs have decided not to pursue their claims against defendants.

II.

DISCUSSION

A. DEFENDANTS' RULE 50(b) MOTION

1. Legal Standard

A renewed motion for judgment as a matter of law, also referred to as a motion for judgment not withstanding the verdict, can be raised when a motion for judgment as a matter of law, otherwise known as a directed verdict, has been denied. Fed. R. Civ. P. 50(b). A Rule 50(b) motion must be preceded by a motion for directed verdict at the close of all evidence. *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 183 n.9 (9th Cir. 1989), *cert. denied* 498 U.S. 1058, 110 S.Ct. 868 (1990). In addition, the motion must be made on the same grounds as the directed verdict motions. *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990).

The evidence must be viewed most favorably towards the party against whom the motion is made and that party is to be given the benefit of all reasonable inferences that may be drawn from the evidence. *Favorito v. Pannell*, 27 F.3d 716 (1st Cir. 1994). The motion should be granted only if there is "no legally sufficient evidentiary basis for a reasonable jury to find for that party on an issue . . . " Fed. R. Civ. P. 50(a).

"The fundamental principle is that there must be a minimum of judicial interference with the jury." 9A Wright & Miller, *Federal Practice and Procedure*, Civil § 2524, p. 261 (1995). The court may not substitute its judgment of the facts for the judgment of the jury. *Tennant v. Peoria & Pekin Union Railroad Co.*, 321 U.S. 29, 64 S.Ct.

409, (1944). Rather, a jury verdict may be set aside if manifest injustice will result if allowed to stand. *See Marley v. City of Allentown*, 774 F.Supp. 343, 344 (E.D.Pa. 1991), *aff'd* 961 F.2d 1567 (3rd Cir. 1992).

2. Analysis

Defendants' Rule 50(b) motion seeks a judgment notwithstanding the verdicts on the following grounds:

a. Plaintiffs' Equal Protection Claim

Defendants argue plaintiffs' equal protection claim is not cognizable because the First Amendment, not the Fourteenth, governs all the constitutional claims raised by plaintiffs; and alternatively, that there is insufficient evidence to support the jury's finding on the equal protection claim.

First, the Court rejects defendants' argument that plaintiffs' claims were governed solely by the First Amendment. The equal protection clause of the Fourteenth Amendment also provides a separate and distinct basis for relief. Defendants' reliance upon *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 811 (1994) and *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989) is misplaced.

In *Albright*, the Court held that plaintiff's section 1983 action arising out of his wrongful arrest and prosecution could not be pursued under a Fourteenth Amendment substantive due process claim, but instead, should be pursued under the Fourth Amendment. The *Albright*

Court's rationale was largely based upon its unwillingness to further extend the scope of the Fourteenth Amendment's concept of substantive due process:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this unchartered area are scarce and open-ended.

Albright, 114 S.Ct. at 812, (quoting *Collins v. Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 1068 (1992)).

The present case is distinguishable from *Albright* on numerous grounds, the most obvious of which is that the present action addresses an alleged violation of the Fourteenth Amendment's equal protection clause, not substantive due process. This Court, thus, declines to extend *Albright* to limit a genuine equal protection claim. This result is in accord with at least one other circuit court. *See, Gehl v. Koby*, 63 F.3d 1528, 1538 (10th Cir. 1995) ("differential treatment could implicate equal protection concerns, just as it could First Amendment concerns"), *citing, Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 94-95, 92 S.Ct. 2286 (1972) (where city officials apply an ordinance differentially to similarly situated groups, "the equal protection claim is closely intertwined with First Amendment interests.").

Next, defendants argue there is insufficient evidence to establish a prima facie case of an equal protection violation. Specifically, defendants contend there was no evidence presented at trial that plaintiffs were treated differently than *similarly situated employees*; namely, firefighters who had similar or more personnel transaction

form ("PTF") violations, exercised First Amendment rights, but were not disciplined as severely as plaintiffs.

Although – even at this stage of the litigation – plaintiffs' theory of their equal protection claim is not entirely clear to the Court, there appears to be at least two possible theories upon which plaintiffs' claim may rest.[4] First, one viable argument is that defendants

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[4] The precise nature of plaintiffs' equal protection claim is not made clear by the jury instruction either. It appears the jury instruction incorrectly merged the fundamental right component with the rational basis test. In that regard, the jury instruction, which was identical for each plaintiff, provided, in relevant part:

> Question No. 1: Do you find that any non-plaintiff employees of the City of Westminster, who were disciplined for violating the rules and regulations of the City, were similarly situated to plaintiff ___.
>
> * * *
>
> Question No. 2: Do you find that those similarly situated non-plaintiff employees systematically received no discipline or less discipline than plaintiff ___.
>
> * * *
>
> Question No. 3: Do you find there was a legitimate basis for such treatment?
>
> * * *
>
> Question No. 4: If you find there was no legitimate basis for such different treatment, and the reasons given were not the true reasons, do you also find that based on a preponderance of evidence any of the following defendants intentionally treated plaintiff differently because plaintiff had engaged in protected First Amendment activities?

violated plaintiffs' equal protection rights by treating plaintiffs differently from other PTF violators because of an animosity toward their political activities; a selective enforcement theory. An alternative argument is that defendants arbitrarily, purposely and invidiously chose to discipline plaintiffs, while other similarly situated non-plaintiffs were not as severely disciplined. If the evidence supports either theory then the jury's verdict must be upheld. *Cf., Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1151 (9th Cir. 1990) ("[Court] must reconcile the jury's verdict responses by the use of any reasonable theory consistent with the evidence.").

Generally, "[e]qual protection demands at a minimum that a municipality must apply its laws in a rational and nonarbitrary way." *Ciechon v. City of Chicago*, 686 F.2d 511, 522 (7th Cir. 1982), *citing, Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S.Ct. 1064, 1072-1073 (1886). "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' " *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561 (1920)); *see also, City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3253-54 (1985).

> Because the [equal protection] clause's protection reaches only dissimilar treatment among similar people, if the challenged government

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The Court recognizes that if plaintiffs' equal protection claim was indeed based upon plaintiffs' exercise of free speech, application of strict scrutiny, rather than rational basis, was appropriate. *See, Armendariz v. Penman*, 73 F.3d 1311 (9th Cir. 1996). The jury instruction suggests both theories of equal protection liability discussed herein.

> action does not appear to classify or distinguish between two or more relevant persons or groups, then the action does not deny equal protection of the laws.

Mahone v. Addicks Utility District, 836 F.2d 921, 932 (5th Cir. 1988); *see also Samadd v. City of Dallas*, 940 F.2d 925, 941 (5th Cir. 1991) (plaintiff failed to state an equal protection violation because no similarly situated group or person was alleged); *Trister v. University of Mississippi*, 420 F.2d 499, 502 (5th Cir. 1969) (court explained that plaintiffs, members of defendant's faculty, "do have the constitutional right to be treated by a state agency in no significantly different manner from others who are members of the same class, i.e., members of the faculty of the University of Mississippi School of Law."); *Arroyo Vista Partners v. County of Santa Barbara*, 732 F.Supp. 1046, 1055 (C.D. Cal. 1990) ("With regard to the equal protection challenge, this issue is whether all persons similarly situated were treated alike.").[5]

Thus, what is central to the current dispute, and clear from controlling case law, is that to prevail on their equal protection claim, plaintiffs must establish that they were

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[5] Plaintiffs also rely upon *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), for the proposition that a plaintiff need not allege that "same or similar" persons or groups were treated differently in order to state an equal protection claim. *Id.* at 179. In *Esmail*, Chief Judge Posner recognized that a plaintiff who is a member of a class of one may, under certain circumstances, state an equal protection claim. *Id.* Whether or not the Ninth Circuit would embrace such a position, the current action is inapposite to *Esmail*. That is, the present case does not involve a one-person class.

treated differently from similarly situated persons or groups.

1) Selective Enforcement Based Upon First Amendment Activity

Mere selectivity in the enforcement of regulations is not in itself a violation of the constitution. *See e.g., United States v. Christopher*, 700 F.2d 1253, 1258 (9th Cir. 1983), *cert. denied* 461 U.S. 960, 103 S.Ct. 2436 (1983). "To state an equal protection claim, a plaintiff must charge a governmental body not only with deliberately acting against the plaintiff, but also with singling him out for selective enforcement on an impermissible basis." *Arroyo Vista*, 732 F.Supp. 1046 (C.D. Cal. 1990), *citing Brady v. Town of Colchester*, 863 F.2d 205, 216 (2nd Cir. 1988). More specifically, a government agency must single out for unlawful treatment the plaintiff in contrast to others similarly situated. *Albert v. Carovano*, 851 F.2d 561, 573 (2nd Cir. 1988). The plaintiff must allege "purposeful and systematic discrimination" by specifying instances in which he or she was singled out. *Id.* The selective enforcement must be invidious, in bad faith, or be an attempt by the government to prevent the plaintiff from exercising constitutional rights. *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531 (1985).

The equal protection clause of the Fourteenth Amendment is further implicated when governmental action "impermissibly interferes with the exercise of a fundamental right." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562 (1976). Thus, because First Amendment rights are fundamental, a classification

relating to them is subject to a strict scrutiny analysis under the equal protection clause. *See, San Antonio School Dist. v. Rodrequiz*, 411 U.S. 1, 40, 93 S.Ct. 1278, 1300; *Lyng v. International Union, UAW*, 485 U.S. 360, 368, 108 S.Ct. 1184, 1191, n. 6 (1988).

Here, the evidence does not support a finding of equal protection liability based upon defendants' selective enforcement of discipline resulting from plaintiffs' exercise of their First Amendment rights. The first inquiry is whether or not there is evidence of similarly situated non-plaintiffs by which to compare defendants' treatment of plaintiffs. Although this may appear to be a simple task of classification, it is not because even within the class of plaintiffs, the level of discipline varied. Plaintiffs Raphael and Herr were terminated, while plaintiffs Bowler and Wilson were initially terminated but subsequently reinstated with a reduction in pay for a year. Complicating the matter was conflicting evidence regarding Herr's and Raphael's responsibilities and their alleged failure to perform their duties, which allegedly attributed to the imposition of harsher discipline.

The PTF violations, however, are common reasons for discipline imposed upon all plaintiffs and non-plaintiffs alike. In that regard, the jury was presented with the KPMG Peat Marwick report which evidenced PTF violations of both plaintiffs and non-plaintiffs. (Plaintiffs' Trial Exh. 23.) Thus, from the KPMG Peat Marwick report, the jury could have reasonably concluded that certain plaintiffs and non-plaintiffs named in the KPMG Peat Marwick report were "similarly situated PTF violators" for purposes of an equal protection analysis.

There is no evidence, however, of whether or not those "similarly situated non-plaintiff PTF violators" engaged in First Amendment protected speech. For the first time in their opposition briefs, plaintiffs suggest comparison of their discipline to that of Glen Hines, another firefighter who was disciplined for failing to file PTFs, and was suspended for one month without a decrease in pay.

However, up until July 27, 1995, only days before trial commenced, Hines was a plaintiff in the present action, and also contended he was disciplined for exercising his First Amendment rights and that in disciplining him the defendants denied him equal protection of the law. Indeed, the controlling pre-trial conference order identifies Hines as a plaintiff in this action. To allow plaintiffs to now use evidence of a former plaintiff as a comparator would be patently unfair. Plaintiff's argument is simply too little, too late. At the time the Hines evidence was offered there was no suggestion that it was offered for the purpose of using Hines as a comparator for plaintiffs' equal protection claim.[6] Rather, plaintiff's attorney's arguments at trial indicate that plaintiffs offered the Hines evidence in conjunction with their First Amendment retaliation claim. (*See* Reporter's Notes, September 7 & 8, 1996.) To allow evidence of Hines to be

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[6] Even if Hines were considered as a non-plaintiff PTF violator by which an equal protection comparison could be made, plaintiffs concede that Hines was not similarly situated to plaintiffs Wilson and Bowler, who respectively had thirty-four and thirty missing PTFs. (Plaintiffs' Response to Supplemental Brief, p. 6-7.)

used as a comparator for equal protection would be manifestly unjust. Thus, as a matter of law, the Court will not allow plaintiffs to rely on the evidence regarding Hines as a comparator to support plaintiffs' equal protection claim.

Likewise, there is no evidence that other non-plaintiff PTF violators referenced in the evidence, namely Blan, Carneghi, Crow and Easly, did not engage in protected First Amendment activity. Contrary to plaintiffs' contention, the jury could not reasonably infer that these non-plaintiff firefighters engaged in First Amendment activities from the evidence that many of the firefighters attended rallies and passed petitions. Such an inference would be nothing more than mere speculation. (See discussion *infra*, p. 18-19.) The jury simply did not know whether or not the similarly situated non-plaintiff PTF violators also engaged in First Amendment activity. As such, there is no basis from which the jury could reasonably ascertain that it was plaintiffs' political speech which caused defendants to treat plaintiffs differently than similarly situated non-plaintiffs.

2) Rational Basis Standard

Alternatively, plaintiffs argue the evidence supports the jury's finding that plaintiffs were more harshly disciplined than other similarly situated non-plaintiff firefighters, and that such discipline was based upon an intentional, arbitrary, and irrational decision to discriminate among the plaintiffs and non-plaintiffs. *See, Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982) (no justification for discharging plaintiff while failing to proceed

against fellow paramedic who had equal responsibility on ambulance out of which discharge arose).

When state action does not implicate a fundamental right or a suspect classification, it will pass constitutional muster under the equal protection clause so long as it bears a rational relation to a legitimate state interest. *Armendariz v. Penman*, 75 F.3d 1311, 1326-1327 (9th Cir. 1996). "[T]he rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary." *Id.* (quoting *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990).

As discussed above, from the KPMG Peat Marwick report, the jury could have made a determination that plaintiffs were similarly situated to non-plaintiff PTF violators. Plaintiffs also argue that the jury could have reasonably inferred the level(s) of discipline imposed upon these respective "similarly situated non-plaintiffs" from defendant Demonaco's testimony that he prepared numerous notices of disciplinary action on the day of the recall election. Therefore, plaintiffs argue, that in conjunction with the KPMG Peat Marwick report, the jury could infer that there were many non-plaintiffs who had as many or more incidents of PTF violations, but received lesser discipline than plaintiffs.

Neither plaintiffs' argument nor the jury's conclusion in this regard is supported by the evidence. Demonaco's trial testimony did not identify either the level(s) of disciplinary action taken or which individuals received the various levels of discipline. Thus, for the jury to conclude that similarly situated non-plaintiff PTF violators received less severe discipline than plaintiffs would be

nothing more than mere speculation. That is, there is no reasonable evidentiary link from which to conclude that the non-plaintiff PTF violators who were found to be similarly situated to plaintiffs were also the non-plaintiff PTF violators who received less severe discipline than plaintiffs.

The Court, therefore, finds that the evidence presented at trial does not support the jury's verdicts on the equal protection claim of plaintiffs Herr, Rapheal [sic], Bowler and Wilson under any possible legal theory offered by plaintiffs. The Court thus grants defendants' Rule 50(b) motion for judgment as a matter of law with respect to plaintiff Herr's, Rapheal's [sic], Bowler's, and Wilson's equal protection claims.

b. Causation

Defendants next contend that plaintiffs failed to prove the requisite motive or state of mind on the part of defendant Huntley, and as a result, plaintiffs failed to prove causation in fact as a matter of law with respect to their First Amendment retaliation claim. Defendants argue that because the jury exonerated Huntley that it implicitly found that Huntley had legitimate reasons for upholding plaintiffs' termination. Defendants argue that applying the Supreme Court's analysis in *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977), to the jury's verdicts, there can be no causation in fact.

Defendants' argument is flawed on several levels. First, Huntley's "exoneration" does not necessarily imply that the jury found that Huntley had legitimate reasons

for his conduct. That is, there was no finding that Huntley imposed discipline for legitimate reasons. Rather, just as reasonable an inference is that plaintiffs failed to meet their burden of proof regarding Huntley.

Second, defendants' analysis of *Mount Healthy* is flawed. Defendants contend that under *Mount Healthy*, to prevail on a First Amendment claim based on retaliatory discipline, a plaintiff must prove he was disciplined *solely* for his speech activities. This is simply incorrect.

In *Mount Healthy*, the Supreme Court held that once a plaintiff proves a constitutional violation, the burden of proof is on the defendant to show that there was no cause in fact relationship between the constitutional violation and plaintiffs' damage stemming from the violation. Specifically, *Mount Healthy*, provides that in mixed motive cases, the plaintiff has the initial burden to establish that his conduct was constitutionally protected, and that this conduct was a "substantial" or "motivating"[7] factor in the decision to discipline plaintiff. *Id.*, 429 U.S. at 287, 97 S.Ct. at 576. 97 S.Ct. at 576 [sic]. Then the burden shifts to the defendant to establish by a preponderance of the evidence that it would have imposed the same discipline even in the absence of the protected conduct. *Id.*

Here, the jury was given a *Mount Healthy* instruction. There was ample evidence from which the jury could reasonably conclude that plaintiffs' protected speech was

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[7] The Supreme Court suggests that by "motivating" factor it means discriminatory purpose. *See, Mount Healthy*, 429 U.S. at 287, 97 S.Ct. at 576, n. 2; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270-271, 97 S.Ct. 555, 566, n. 21 (1977).

a "substantial factor" in defendants' decision to discipline plaintiffs. Likewise, ample evidence was also presented for the jury to reasonably conclude that defendants disciplined plaintiffs for an improper reason.

Next, defendants rely upon *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986)[8], to argue that the jury's verdict in favor of Huntley breaks the "chain of causation." This argument was raised in defendants' Rule 50(a) motion prior to the jury's verdicts and in plaintiffs' Rule 50(a) motion regarding *Monell* liability, and rejected by the Court in both instances. Defendants arguments are not any more persuasive now than when last considered by the Court.

In *Smiddy II, supra*, 803 F.2d 1469, plaintiff brought a § 1983 action for wrongful arrest in violation of his constitutional rights. *Id.* at 1470. The jury found that the arresting officers had no probable cause for arresting plaintiff, and assessed damages against the officer defendants. *Id.* at 1470-1471. The Ninth Circuit, however, reversed the assessment of damages against the officer defendants.

The *Smiddy II* court held that a police officer's liability for wrongful arrest following the filing of criminal charges may be cut off by the independent decision of a prosecutor to file a criminal complaint. *Id.* at 1471. The court reasoned that there was a rebuttable presumption that a prosecutor exercises independent judgment regarding the existence of probable cause in filing a criminal complaint and that absent evidence that police officers

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[8] Modified on denial of rehearing, 811 F.2d 504 (9th Cir. 1987).

knowingly submitted false information or pressured the prosecutor to act contrary to his or her independent judgment, the police officer's liability was cut off as a matter of law. *Id.*

This Court was unable to locate any case where *Smiddy II* was applied to any situation other than the narrow issue of the apportionment of damages in cases of unconstitutional arrest. In any event, this case is nothing like *Smiddy II*. In *Smiddy II*, the prosecutor – not the officer defendants – had final decision-making authority regarding prosecutions, which was central to the *Smiddy II* court's reasoning that the officer defendants were insulated from liability caused by that decision. Further, no conspiracy was found between the officer defendants and the prosecutor. In contrast, here, Huntley did not have final decision making authority – the City Counsel did. Further, the jury found that a majority of the City Counsel participated in the conspiracy to violate plaintiffs' civil rights.

Defendants' reliance on *North v. Madison Area Assoc. For Retarded Citizens-Developmental Centers Corp.*, 844 F.2d 401 (7th Cir. 1988) ("*MAARC*") is likewise misplaced. In *MAARC*, plaintiff brought a Title VII action against his former employer. The court held that plaintiff's case failed for lack of causation. The court reasoned that plaintiff "has failed to demonstrate that the Board's proffered reasons for eliminating North's position were pretextual, or that race was a motivating or substantial factor behind that decision." *Id.* at 408.

As discussed above, and unlike in *MAARC*, here the jury found that defendants would not have made the

decision to discipline plaintiffs had plaintiffs not exercised their First Amendment rights. To use Title VII language, the discipline was pretextual, and plaintiffs exercising their constitutional rights was a motivating or substantial factor behind defendants' decision to impose the respective levels of discipline upon plaintiffs.

There was sufficient evidence presented at trial from which a reasonable jury could infer that defendants' conduct caused plaintiffs' damages. Defendants' Rule 50(b) motion on the issue of causation is **denied**.

c. Sufficiency of Evidence Re First Amendment Retaliation Claim

Next, defendants argue that there was insufficient evidence to sustain the jury's findings on the First Amendment claims in the following respects: (1) there was no evidence plaintiff Bowler exercised his First Amendment rights; (2) there was insufficient evidence that Defendants Demonaco and Anderson retaliated against plaintiffs; and (3) there was insufficient evidence to establish a conspiracy.

1) Plaintiff Bowler

At the threshold, defendants did not raise this issue in their Rule 50(a) motion made at the close of all evidence. As such, the Rule 50(b) motion will be treated as a motion for a new trial. *Posadas de Mexico, S.A. de C.V. v. Dukes*, 789 F.Supp. 121 (S.D.N.Y. 1992).

A motion for a new trial should be granted when, in the opinion of the district court, "the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice." *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363 (2nd Cir. 1988). In contrast to the standard applied in considering a motion for judgment notwithstanding the verdict, a trial judge ruling on a motion for new trial "is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner." *Id.* "If, having given full respect to the jury's finding, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial." *Landes Const. Co. v. Royal Bank*, 833 F.2d 1365, 1371 (9th Cir. 1987).

Defendants contend there is no evidence that plaintiff Dana Bowler exercised his First Amendment rights. In response, plaintiffs argue the evidence establishes there were 69 firefighters in the Westminster Fire Department and that there were 69 dues paying members of the union. Thus, plaintiffs argue, the jury could infer Dana Bowler was a member of the union. This is a reasonable inference.

Plaintiffs further note the evidence was that 600 firefighters participated in two rallies in support of the recall effort and that most union members walked precincts, leafleted and gathered signatures for the recall election. From this, plaintiffs argue, the jury could have reasonably inferred that Bowler had been one of the individuals at these rallies, given the number in attendance, or walked precincts, or exercised other political speech because he

was a union member. This, however, is not a reasonable inference.

Even if Bowler was a union member, there is no evidence that every firefighter was active in the union's political affairs, much less that Bowler was. Likewise, evidence that 600 firefighters attended rallies or walked precincts does not establish – more likely than not – that Bowler was among them. As such, the jury's conclusion that Bowler participated in political speech is little more than speculation, and does not have a sufficient evidentiary basis. *See Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 346 (9th Cir. 1978) (evidence must "provide enough information from which a fair-minded juror could logically infer that [one conclusion] is more likely true than another. Parties are entitled to have the determination of their rights rest on more than speculation and guesswork.")

Defendants' Rule 50(b) motion as to plaintiff Dana Bowler's First Amendment retaliation claim will be treated as a motion for a new trial, and is **granted**.

2) Defendants Demonaco and Anderson

Defendants contend that because defendant Demonaco simply initiated discipline, there is no evidence from which to infer that protected conduct was a substantial motivating factor in Demonaco's decision to recommend discipline. Similarly, defendants argue that Anderson merely decided to uphold Demonaco's recommendations. As such, defendants argue, there was no evidence of discriminatory intent (motivating factor). Defendants rely

on *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983), for the proposition that plaintiffs must prove "specific, substantial evidence of pretext."

Steckl, however, is inapposite to the present case. In *Steckl*, plaintiff alleged he was not promoted in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. As fully discussed above, the Supreme Court's holding in *Mount Healthy* controls this case. Again, the jury was properly instructed. Moreover, evidence was presented regarding Anderson's and Demonaco's participation in the events from which a jury could have reasonably inferred that plaintiffs' protected speech was a substantial factor in Demonaco's and Anderson's decision to initiate and uphold plaintiffs' discipline. Defendants' Rule 50(b) motion on behalf of Demonaco and Anderson is **denied**.

3) Conspiracy

Defendants argue that there is insufficient evidence of a conspiracy. Defendants' and plaintiffs' briefs detail the evidence against each defendant found guilty of conspiracy.[9] The jury was properly instructed on this issue. There was ample evidence presented regarding each defendants' respective conduct from which a jury could reasonably infer that a conspiracy existed. Defendants' Rule 50(b) motion regarding the conspiracy claim is therefore **denied**.

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[9] Those defendant include Demonaco, Anderson, Mayhew, Schweisinger, Smith and Lam.

d. Plaintiff Gilbrook's Slander Per Se Claim

Defendants argue they are entitled to judgment as a matter of law on plaintiff Gilbrook's slander claim for three reasons. Defendants first argue that Schweisinger's statement that Gilbrook is a "Jimmy Hoffa" is protected speech because the statement is "figurative or hyperbolic language" that does not articulate an "objectively verifiable event."[10] Defendants argue that Schweisinger's statement was merely an opinion made in heated political debate. In response, plaintiffs contend that to call someone a "Jimmy Hoffa" is a statement that implies only one thing: that the person was a crook.

Under recent Ninth Circuit case law, *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995), the issue is whether reasonable minds would take the "Jimmy Hoffa" statement to be factual. The Ninth Circuit explained the proper analysis:

> To determine whether a statement implies a factual assertion, we examine the totality of the circumstances in which it was made. First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statement, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we

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[10] Under California law, only defamatory statements of fact are actionable. *Gill v. Hughes*, 227 Cal.App.3d 1299, 278 Cal.Rptr. 306 (1991).

> inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

Id. at 366.

Jimmy Hoffa is universally known as an unscrupulous union leader, who's reputation is drenched in his ties to the criminal underworld. Here, Gilbrook was also a union leader, whose union members had been accused by various City officials of cheating the City out of money through, *inter alia,* improper overtime charges. The implication was clear: Gilbrook was a thief.

Defendants next argue that there was insufficient evidence to establish that Schweisinger's statement made outside the Council meeting was published. Specifically, defendants argue, Garrison testified that Schweisinger made his Jimmy Hoffa statement once outside the City Council meeting, but did not testify that he nor any other third party was present.

At trial, Schweisinger admitted to making this statement, and that while Garrison did not positively say he was present when Schweisinger called Gilbrook a Jimmy Hoffa outside the City Counsel meeting, there was no indication that he heard about the statement from any other source. Thus, the jury could have reasonably inferred that since Garrison testified that Schweisinger made a statement outside the Council meeting, Garrison could have overheard Schweisinger making the statement to another. There would be no other way Garrison would have first hand knowledge that the statement was made in the first instance.

Finally, defendants argue there was insufficient evidence from which the jury could have inferred actual malice on the part of Schweisinger. The Court disagrees. There was substantial evidence that Schweisinger believed the firefighters were committing a "fraud" through their overtime conduct, and that was the impetus for making the Jimmy Hoffa statement. The jury was also presented with evidence regarding whether the PTF violations constituted a "fraud" on the City, and who was aware of that information. From that, the jury could have reasonably inferred that Schweisinger made the "Jimmy Hoffa" statement with malice.

As such, defendants' Rule 50(b) motion on Gilbrook's slander claim is **denied**.

e. Punitive Damage

Finally, defendants argue that because, when imposing *Monell* liability, the Court found that the City Council member defendants acted in their official capacity, that the punitive damage awards against them are improper. Defendants rely upon *Mitchell v. Dupnik*, 67 F.3d 216 (9th Cir. 1995).

First, the *Mitchell* opinion relied upon by defendants has been withdrawn and superseded on denial of rehearing. *Mitchell v. Dupnik*, 75 F.3d 517 (9th Cir. 1996). In any event, *Mitchell* is inapposite to the present case. In *Mitchell*, an inmate brought a § 1983 action against various law enforcement and corrections officers. The trial court awarded punitive damages against the individual defendants "in their official capacities." *Id.*, 67 F.3d at 223. The

court held that this portion of the award was contrary to the law. The court observed "that a suit against a governmental officer in his official capacity is equivalent to a suit against the governmental entity itself." *Id.* (citation omitted).

> The district court's award of $100,000 in punitive damages against Dupnik, Bosman and Fimbers in their official capacities is in reality an assessment against the county, which is immune from such damages.

Id.

Here, however, the City Council member defendants were sued in their individual capacity, thus exposing them to potential punitive damage liability. Further, state and local officials may be held personally liable for damage under § 1983 based upon action taken in their official capacity. *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358 (1991). In rejecting the contrary position, the Supreme Court explained:

> [Hafer's] theory would absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities. Yet our cases do not extend absolute immunity to all officers who engage in necessary official acts. Rather, immunity from suit under § 1983 is "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interest behind it," . . .

Id., 502 U.S. at 28, 112 S.Ct. at 363, *citing Imbler v. Pachtman*, 424 U.S. 409, 421, 96 S.Ct. 984 (1976).

Defendants' arguments lack merit, and as such, defendants' Rule 50(b) motion regarding punitive damages is **denied**.

B. DEFENDANTS' MOTION FOR A NEW TRIAL

Defendants' Motion for a new trial is based on the following grounds: (1) the jury's verdicts on the civil rights claims are not supported by the weight of the evidence; (2) Gilbrook's slander claim for reasons discussed in defendants' Rule 50 motion; (3) plaintiff Raphael's civil rights claims because the jury verdicts on liability were inconsistent; (4) certain jury instructions were incorrect and prejudicial; (5) certain evidentiary errors were prejudicial; (6) attorney misconduct in the examination of defendant Mayhew's during the punitive damage phase; and (7) the amount of punitive damages awarded was excessive as a matter of law.

1. Legal Standard

Under Federal Rule of Civil Procedure 59, the court may grant a new trial as to all or any of the parties and on all or part of the issues. Fed. R. Civ. P. 59(a). A new trial may be granted if the verdict is "contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial judge, a miscarriage of justice." *Hanson Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1245 (Fed. Cir. 1989), *cert. denied*, 493 U.S. 853, 110 S.Ct. 154 (1989) (quoting *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied* 429 U.S. 1074, 97 S.Ct. 813 (1977)). However, a new trial should not be granted simply because the court

would or could have weighed the evidence differently or reached a contrary result. *Markovich v. Bell Helicopter Textron, Inc.*, 805 F.Supp. 1231 (E.D. Pa. 1992), *aff'd* 977 F.2d 568 (3rd Cir. 1992). Although the judge may weigh the evidence and assess the credibility of witnesses, and need not view the evidence in a light most favorable to the moving party, "a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the finding of the jury, regardless of his own doubts in the matter." *Landes Construction Co v. Royal Bank of Canada,* 833 F.2d 1365, 1371 (9th Cir. 1987). If on the other hand, having given full respect to the jury's findings and having reviewed the entire evidence, the judge "is left with the definite and firm conviction that a mistake has been committed," a new trial should be granted. *Id.* It is insufficient that the district court would simply have reached a different verdict. *Richardson,* 868 F.2d at 1245.

2. Analysis

a. Civil Rights Claims

With regard to plaintiffs' equal protection claims, the Court conditionally grants defendants' motion for a new trial on plaintiffs Herr's, Rapheal's [sic], Bowler's, and Wilson's equal protection claims pursuant to Fed. R. Civ. P. Rules 50(c) and 59. In addition to the grounds set forth in its Rule 50(b) ruling on equal protection, the Court's conditional grant of a new trial is also based upon the erroneous equal protection jury instruction. (See, *supra*, p. 6, n.4.)

Moreover, the Court has already addressed defendants' motion for a new trial with regard to the jury's verdict on Dana Bowler's First Amendment claim. Therefore, the Court's analysis will focus solely upon plaintiffs Herr's and Wilson's First Amendment claims.

First, defendants argue that a new trial should be granted on plaintiffs' First Amendment retaliation claims because they are against the clear weight of the evidence on liability. Defendants call the Court's attention to the following evidence, and argue: (1) the financial review committee ("FRC") was an independent group of citizens whose views could not be attributable to defendants; (2) there is overwhelming evidence that the reorganization of the fire department was economically motivated; (3) Peat Marwick performed an independent review which raised legitimate concerns about overtime in the fire department and PTF violations; (4) defendants' contract with the Orange County Fire Authority does not support an inference of retaliatory motive; and (5) the evidence that plaintiffs violated the City's rules and merited discipline is "effectively unrefuted."

In response, plaintiffs argue that even drawing the inferences defendants suggest from the above-identified evidence, the totality of the evidence presented supports the jury's finding of liability.

Plaintiffs' opposition brief persuasively sets forth the various inferences a reasonable jury could draw from the above-identified evidence which support the jury's verdict of liability. (Plaintiffs' Opposition Brief ("Opp. Brief"), pp. 2-5.) For example, although the FRC recommendations were made by an independent group, an

inference of unlawful, retaliatory intent could be drawn from the fact that the FRC report was discussed in City Council meetings and certain FRC recommendations were ultimately undertaken. Likewise, the Peat Marwick report discussed the fact that plaintiffs' conduct was not unlawful, but recommended changes so the Fire Department would be more efficient. That defendants still decided to terminate plaintiffs even though plaintiffs' alleged improper conduct was within current Fire Department policy, could again suggest unlawful motive.

Similar observations can be made with regard to the remaining identified evidence. (*See e.g.*, Opp. Brief, pp. 3-5.) Simply put, although defendants would like the Court to weigh the evidence, draw every inference in defendants' favor, and thus grant a new trial, that is neither appropriate nor warranted in this instance. The totality of the evidence suggests that the jury's verdicts on the First Amendment claims are not clearly incorrect so as to constitute a miscarriage of justice. Defendants' motion for a new trial based on its argument that the jury's verdicts on plaintiffs Herr's and Wilson's First Amendment claims are against the clear weight of the evidence is **denied**.

b. The Slander Claim

For the same reasons articulated in the Court's Rule 50(b) analysis of plaintiff Gilbrook's slander claim, *supra*, defendants' motion for a new trial on this claim is likewise **denied**.

c. Plaintiff Raphael

Next, defendants argue that a new trial should be granted on plaintiff Raphael's civil rights claims because the jury verdicts on liability are inconsistent. The Court's rulings on defendants' Rule 50(b) and 59 motions regarding the equal protection claims sufficiently deal with defendants' concerns in this regard.

d. Jury Instructions

Defendants argue the following jury instructions were incorrect and prejudicial: (a) the conspiracy instruction; (b) defendants' rejected proposed instruction that liability could not be based upon the conclusion that plaintiffs were disciplined based upon incorrect information; and (c) the equal protection instruction.

1) Conspiracy Instruction

Defendants argue that the following portion of Jury Instruction No. 31 regarding conspiracy was confusing, misleading and ambiguous:

> However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by word spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. In order to establish that a conspiracy existed, the plaintiffs must show that the members of the conspiracy in some way or manner, or through some contrivance, positively or tacitly came to a

> mutual understanding to try to accomplish a common and unlawful plan.

(Jury Instruction No. 31.)

Defendants argue that the second sentence prejudicially purports to give the jury a standard by which to decide if an agreement or understanding exists. According to defendants, on this instruction, a juror might easily infer a meeting of the minds from the mere fact that two defendants shared a dislike of the plaintiffs. The jury, defendants argue, should have relied upon the circumstantial evidence instruction in this regard.

Jury Instruction No. 31, and specifically the above-identified paragraph, was based upon Edward J Devitt, et al., 3 *Federal Jury Practice and Instruction*, § 103.23. As the comments to § 103.23 observe, Jury Instruction No. 31 was tacitly approved by the Ninth Circuit in *United Steelworkers of America v. Phelps Dodge*, 865 F.2d 1539, 1549-1550 (9th Cir. 1989), *cert. denied*, 493 U.S. 809, 110 S.Ct. 51 (1989). As such, the instruction was proper, and defendants' motion for a new trial on this ground is **denied**.

2) Proposed instruction re liability could not be based on the conclusion that discipline was based on incorrect information

Defendants argue that the following proposed jury instruction was improperly rejected by the Court:

> It is not a violation of the Constitution for a government employer to discipline an employee based on incorrect information or on an incorrect interpretation of information. Thus, if you

> conclude the information that plaintiffs violated department or city policies was incorrect or that defendant interpreted information incorrectly to conclude plaintiffs violated department or city policies, you may not find defendants liable on that basis.

Defendants contend that this instruction would have guided the jury away from determining whether discipline was deserved or not, and would have kept the jury focused on whether defendants were unlawfully motivated when they imposed discipline. Defendants further contend this instruction was prejudicial as the jury "clearly considered" this type of information in its decision, as evidenced by Juror Note No. 6.[11] In support of this instruction, defendants rely on *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878 (1994); *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684 (1983) and *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074 (1976).

Defendants' argument is not persuasive. Both *Connick* and *Bishop* observed that *absent* a federal constitutional or statutory violation, if the discipline was based on incorrect information, the defendant is not liable for a violation of civil rights. *See Connick*, 461 U.S. at 146-147 ("Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to

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[11] Juror Note No. 6 provides, in relevant part: "One of the jurors is struggling with these issues because of relevant work experience – i.e., if one charge lacks sufficient proof, then the entire termination process is invalid."

be mistaken or unreasonable."); *Bishop*, 426 U.S. at 350 ("In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can be corrected in other ways.") Here, a deprivation of plaintiffs' constitutional rights is clearly implicated.

In *Waters v. Churchill*, the Supreme Court addressed the issue of whether a public employer that terminates an employee based on credible, substantiated reports of unprotected, insubordinate speech should be held liable for retaliatory discharge under the First Amendment if it is later shown that the reports were inaccurate and that the employee actually engaged in protected first Amendment speech, when the employer's ignorance of the protected speech was the a result of an incomplete or inaccurate investigation. There, the plurality adopted a reasonableness requirement under which an employee may not be dismissed or otherwise disciplined unless the employer had a reasonable basis for believing that the speech was either disruptive or that it involved a matter of purely private concern outside the scope of the First Amendment. There was thus a duty to conduct a reasonable investigation into the nature and content of the speech, although not a full-scale investigation. Subjective good faith alone, the Court held, was not sufficient to avoid liability. It was in this backdrop the Court noted that if an employer's investigation was mistaken or erroneous, but conducted in good faith, no liability could be imposed.

Defendants' proposed instruction in the context of this case would have suggested an entirely different legal proposition than are set forth in *Waters, Connick* or *Bishop*. Here, the alleged erroneous report or investigation of the alleged PTF violations did not relate to whether or not plaintiffs' speech was protected; but rather, to defendants' purported reasons for disciplining plaintiffs. As such, defendants' proposed jury instruction would have directed the jury to conclude defendants were not liable if defendants' discipline of plaintiffs was based on erroneous information, regardless of the presence of a constitutional violation. This is a clear misstatement of the law.

The Court properly refused defendants' proposed jury instruction, and thus, defendants' motion for a new trial on this ground is **denied**.

3) Equal Protection Instruction

As noted *infra*, the Court conditionally grants a new trial on plaintiff Herr's, Rapheal's [sic], Bowler's, and Wilson's equal protection claims pursuant to Fed. R. Civ. P. Rules 50(c) and 59, based upon, *inter alia*, the erroneous equal protection jury instruction. (See, *supra*, p. 6, 26, n.4.)

e. Alleged Evidentiary Errors

1) Conspiracy Hearsay Statements

Defendants argue that the following statements were improperly introduced into evidence under Federal Rule of Evidence 801 (d) (2) (E)[12]:

1. The testimony of firefighter Bouza that Schweisinger allegedly said, "We're going to get Paul and Mike.";

2. The testimony of plaintiffs Gilbrook and Garrison that before the 1992 election Smith stated to them "I'll have your ass.";

3. The testimony of Gilbrook that Schweisinger stated: You supported Joy, Chuck won, Joy lost, it's all politics; Chuck is anti-fire.";

4. The testimony of Gilbrook that Schweisinger stated that Smith was against the firefighters for not supporting him in the election; and

5. The testimony of Herr that Schweisinger stated to him that the reorganization of the Fire Department in July 1993 was "political retribution."

The statements, however, are admissible as statements by a party-opponent under Federal Rule of

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[12] Federal Rule of Evidence 801 (d) (2) (E) provides, in relevant part:

> A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

evidence 801 (d) (2) (A)[13]. Here, because all five statements were made by party-opponents, defendants Schweisinger and Smith, they were admissible. Defendants' motion for a new trial on this ground is **denied**.

2) Admission of The Financial Review Committee's Added Recommendations

Defendants contend that the admission of Exhibit 31, the Financial Review Committee's ("FRC") recommendations, was improper because the report was irrelevant since it was generated by private citizens. Thus, defendants argue, it was not illustrative of *defendants'* intent or motive, and is therefore inadmissible. Defendants argue that plaintiffs never linked this exhibit with their conspiracy theory; the only issue upon which it may have been probative.

Exhibit 31 is at least probative on the issue of defendants' intent as to whether the defendants adopted any of the recommendations, and whether or not the recommendations originated with citizens. In any event, the prejudicial effect of Exhibit 31, if at all, was minimal. Given the evidence presented at trial, the jury had ample opportunity to clearly examine each defendant's motives and conduct and clearly distinguish between defendants. For

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[13] Federal Rule of Evidence 801 (d) (2) (A) provides, in relevant part:

> A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement in either an individual or representative capacity.

example, the jury found individual liability against defendants Anderson and Demonaco, but not Huntley. Thus, defendants' motion for a new trial on this ground is **denied.**

3) Evidence of Emotional Distress

Defendants argue it was prejudicial error to allow testimony of any pre-discipline emotional distress. Defendants argue that this evidence was prejudicial because it likely impacted the jury's decision regarding other damages, such as punitive damages. In response, plaintiffs contend that it was proper to admit evidence of emotional distress from the date plaintiffs were presented with notification of discipline until the present.

The Court finds defendants' argument to be without merit, and thus **denies** defendants' motion for a new trial on this ground.

f. Alleged Attorney Misconduct re Examination of Mayhew on Punitive Damages

Defendants argue that plaintiffs' counsel committed an act of misconduct resulting in the denial of a fair trial for defendant Mayhew on the issue of punitive damages. Although the Court had excluded reference to Mayhew's employment, plaintiffs' counsel asked Mayhew "You were terminated by the City Council because you lied on an application; is that correct, sir?" The Court sustained defendants' objection and gave a cautionary instruction to the jury. Defendants argue that the instruction had little effect to undue the prejudice as evidenced by the

total amount of the punitive damage award against Mayhew, $150,000.

To warrant a reversal on grounds of attorney misconduct, the flavor of the misconduct "must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Standard Oil Co. v. Perkins*, 347 F.2d 379, 388 (9th Cir. 1965).

Here, it can not be said that the one impermissible question posed to, but not answered by Mayhew was the reason the jury found Mayhew liable for punitive damages. The jury obviously gave serious consideration to the issues, as evidenced by the differing findings as to liability and damages as against each defendant. The amount of damages involved in this context would not indicate that the jury was in fact unreasonably affected by counsel's conduct. Indeed, the jury came back with punitive damage awards which exceed plaintiffs' request in every instance. It cannot be said the one impermissible question posed was the impetus for Mayhew's punitive damage award or otherwise sufficiently permeated an entire proceeding. Defendants' motion for a new trial on this ground is **denied**.

g. Punitive Damages are Excessive and Against the Weight of the Evidence

At the threshold, the evidence supports an award of punitive damages generally. *See Davis v. Mason County*, 927 F.2d 1473, 1485 (9th Cir. 1991), *cert. denied* 502 U.S. 899, 112 S.Ct. 275 (1991) (a "jury may award punitive

damages under section 1983 either when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others.").

The issue then becomes whether the amount of the punitive damage awards were excessive. The Ninth Circuit has articulated the standard for the trial court's review of a punitive damage award:

> [A] trial court should review the punitive award and record its reasons for upholding or altering it. The trial court can look to the *Hammond* factors or other general elements of reasonableness to determine whether a punitive damage award should be upheld. The broader picture must not be lost. The task of the court is a comparison between the amount of punitive damages actually assessed and a figure derived from the facts of the case at hand. To arrive at this figure, the court should look to awards in similar cases and to its own experience. If the district court rejects the jury award, it should give the plaintiff the option of a remittitur or a new trial on the punitive damage issue.

Morgan v. Woessner, 997 F.2d 1244, 1257 (9th Cir. 1993). The *Hammond* factors include:

> (a) Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; (b) the degree of reprehensibility of the defendant's conduct, duration of the conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the

> wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, there to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 1257, n. 14, *citing Pacific Mutual Life Ins. v. Haslip*, 499 U.S. 1, 17, 111 S.Ct. 1032, 1045 (1991); *see also BMW of North America v. Gore*, ___ U.S. ___, 116 S.Ct. 1589, 1599 (1996) (factors for assessing reasonableness of punitive damage award include degree of responsibility, ratio to actual harm inflicted on plaintiff, and remedy in comparable cases).

Here, defendants contend that even if misconduct is presumed, there is no rational basis for the amount of the punitive damage awards. Defendants note that the jury doubled, and with regard to Mayhew quadruped, the amount plaintiffs requested; that the awards are disproportional to defendants' respective net worth; and that the awards have no relationship to the amount of harm each plaintiff suffered. This, defendants argue, evidences the arbitrariness of the awards.

1) Relationship to conduct

Here, the jury found intentional discriminatory and retaliatory conduct by defendants. The jury also found a conspiracy existed to deprive defendants of their constitutional rights. Plaintiffs were either terminated or

demoted from their employment, disrupting their professional careers. The evidence indicates, and the jury found, defendants' conduct had a profound effect upon plaintiffs. Thus, looking at the defendants' conduct alone, the amount of punitive damages award in this case given the evidence of defendants' intentional conduct does not seem shocking to the Court. Indeed, substantially larger punitive award damage awards have been rendered in retaliatory discharge cases. *See, Kemp v. Ervin,* 651 F.Supp. 495, 508 (N.D. Ga. 1986) (punitive damage of $2,300,000 reduced to $400,000 for professor terminated by state university for First Amendment conduct); *Sanchez v. Sanchez,* 777 F.Supp. 906 (D.N.M. 1991) (court found $180,000 punitive damages against each of two university officials for conspiracy and retaliation against two thirty-year university employees terminated in retaliate for First Amendment conduct).

2) Net worth vs. amount of punitive damages

Factoring the in second element, defendants' net worth, it appears the punitive damage awards may indeed be excessive as to certain defendants.

Defendant Mayhew's testified that his net worth was $5,500, but his annual salary was $93,000. He owns no assets. Mayhew was found liable for punitive damages to plaintiffs Herr, Raphael, Wilson and Bowler for $37,500.00 each, totalling $150,000. The award of $150,000 is more than 2000% of his net worth.

Defendant Lam owns a residence ($60,000 equity), two rental properties ($75,000 equity), and has a restaurant valued at $128,000. Lam has a $7,500 IRA, and earns an annual income of $26,000. Lam was found liable for punitive damages to plaintiffs Herr, Raphael, Wilson and Bowler for $5,000 each, totalling $20,000, which is approximately 13% of Lam's net worth.

Defendant Anderson owns a residence ($180,000 equity), stock ($5,500), savings ($45,000), and earns an annual income after taxes of $60,000. Anderson was assessed with $10,000 in punitive damages, $2,500.00 to Herr, Raphael, Wilson and Bowler. This is less than .01% of Anderson's net worth.

Defendant Demonaco owns a residence (no equity), bank account ($30,000), and recently received $68,000 from the City of Westminster. Mr. Demonaco earns a gross annual income of $75,000. The punitive damage award against him was $120,000, $30,000 to Herr, Raphael, Wilson and Bowler.

Defendant Schweisinger owns a residence ($90,000 equity), a 50% interest in an office building (loss of $20,000), and stocks ($5,000). He owns an interest in a business, which is running at a $40,000-50,000 loss, and earns $58,000 a year. The jury awarded $70,000 in punitive damages against Schweisinger; $10,000 to Herr, Raphael, Wilson and Bower [sic], and $30,000 to Gilbrook.

Defendant Smith owns a home ($82,000 equity), two pieces of rental property ($27,000 and $6,000 equity), IRA ($180,000). He is retired. The jury assessed $200,000 in

punitive damages against Smith, $50,000 to Herr, Raphael, Wilson and Bowler, which is approximately 67% of his net worth.

c) Other factors

There are no criminal charges against defendants relating to this conduct. However, each plaintiff's award against the respective defendants should be evaluated together, as "the existence of other civil awards against the defendant for the same conduct" are to be taken in mitigation.

Further, although the punitive damage awards are not proportionate to the compensatory damage awards, it is not unreasonable for the jury to conclude that each defendant's conduct was equally punishable. Finally, while both plaintiffs and defendants cite comparable cases supporting their respective positions, the Court has also considered its own experience.

Thus, as to defendants Lam, Anderson, and Schweisinger the punitive damage awards are supported by the weight of the evidence, and are not so "grossly excessive, monstrous or shocking to the conscience." *Larez v. City of Los Angeles*, 946 F.2d 630, 639 (9th Cir. 1991).

However, the punitive damage award as to Mayhew, Demonaco and Smith are excessive and against the weight of the evidence. Thus, unless within fourteen (14) days of service of this Order plaintiffs accept a remittitur of the punitive damages as follows, a new trial will be granted on the issue of punitive damages as to Herr and

Wilson and a conditional new trial[14] will be granted as to Rapheal [sic] and Bowler: Demonaco – $15,000 to Herr, Rapheal [sic], Bowler and Wilson each, totalling $60,000; Mayhew – $18,750 to Herr, Rapheal [sic], Bowler, and Wilson each, totalling $40,000; and Smith – $25,000 to Herr, Rapheal [sic], Bowler, and Wilson each, totalling $100,000. *See* 11 Wright & Miller, *Federal Practice and Procedure*, Civil, § 2815 (1995) (while Rule 59 makes no mention of remittitur, the practice has been "sanctioned by long usage").

III.

CONCLUSION

For the foregoing reasons, the Court ORDERS as follows:

1. Defendants' Rule 50(b) motion for judgment as a matter of law is GRANTED as to plaintiff Herr's, Rapheal's [sic], Bowler's, and Wilson's equal protection claims;

2. Defendants' Rule 50(b) motion for judgment as a matter of law as to plaintiff Dana Bowler's First Amendment retaliation claim is treated a motion for a new trial, and the motion for new trial is GRANTED;

3. Defendants' Rule 50(b) motion for judgment as a matter of law is DENIED in all other respects;

4. Defendants' Rule 59 motion for a new trial on plaintiff Herr's, Rapheal's [sic], Bowler's and Wilson's equal protection claim is conditionally granted pursuant to Rule 50(c);

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[14] Fed. R. Civ. P. 50(c).

5. Defendants' Rule 59 motion for a new trial as to the punitive damage award against defendants Demonaco, Mayhew, and Smith will be granted unless within fourteen (14) days of service of this Order plaintiffs accept a remittitur of the punitive damages to $60,000 ($15,000 to Herr, Rapheal [sic], Bowler and Wilson each) against Demonaco, $40,000 ($18,750 to Herr, Rapheal [sic], Bowler, and Wilson each) against Mayhew, and $100,000 ($25,000 to Herr, Rapheal [sic], Bowler, and Wilson each) against Smith. As to Rapheal's [sic] and Bowler's punitive damage awards, the new trial is conditionally granted pursuant to Rule 50(c); and

5. Defendants' Rule 59 motion for a new trial is DENIED in all other respects.

IT IS SO ORDERED.

DATED: July 16, 1996.

/s/ Richard A. Paez
Richard A. Paez
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL GILBROOK, et al., Plaintiffs, v. CITY OF WESTMINSTER, et al., Defendants.	Case No. CV 94 2051 RAP (VAPx) JUDGMENT (Filed Nov. 21, 1995)

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court directs the entry of final judgment as to fewer than all parties and claims, having determined there is no just reason for delay in the entry of separate judgments as to certain plaintiffs on all their claims.

ACCORDINGLY:

This action came on regularly for trial on July 25, 1995 in Courtroom 750 of the United States District Court, the Honorable Richard A. Paez, District Judge, presiding; the plaintiffs appearing by attorneys Alan C. Davis and Sylvia Courtney and the defendants appearing by attorneys Peter J. Ferguson, Harold W. Potter, and Alison Turner. Certain claims having been determined by the Court pursuant to Rule 50(a) of the Federal Rules of Civil Procedure and certain claims having been determined by the jury by special verdicts.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiff Don Herr shall recover from Defendants City of Westminster, Charles V. Smith, Craig Schweisinger, Tony Lam, Don S. Anderson, John T. Demonaco, and Brian Mayhew for violation of his First Amendment and equal protection rights, the sum of $770,000 in compensatory damages.

2. Plaintiff Don Herr shall recover the sum of $50,000 from Defendant Charles V. Smith, $10,000 from Defendant Craig Schweisinger, $5,000 from Defendant Tony Lam, $2,500 from Defendant Don S. Anderson, $30,000 from Defendant John T. Demonaco and $37,500 from Defendant Brian Mayhew in punitive damages.

3. Plaintiff Hal Raphael shall recover from Defendants City of Westminster, Charles V. Smith, Craig Schweisinger, Tony Lam, Don S. Anderson, John T. Demonaco and Brian Mayhew for violation of his right to equal protection of the law, the sum of $1,100,000 in compensatory damages, but shall take nothing against defendants on his claim for violation of his First Amendment rights.

4. Plaintiff Hal Raphael shall recover, the sum of $50,000 from Defendant Charles V. Smith, $10,000 from Defendant Craig Schweisinger, $5,000 from Defendant Tony Lam, $2,500 from Defendant Don S. Anderson, $30,000 from Defendant John T. Demonaco and $37,500 from Defendant Brian Mayhew in punitive damages.

5. Plaintiff Joe Wilson shall recover from Defendants City of Westminster, Charles V. Smith, Craig Schweisinger, Tony Lam, Don S. Anderson, John T. Demonaco and Brian Mayhew for violation of his First

Amendment and equal protection rights, the sum of $49,000 in compensatory damages.

6. Plaintiff Joe Wilson shall recover, the sum of $50,000 from Defendant Charles V. Smith, $10,000 from Defendant Craig Schweisinger, $5,000 from Defendant Tony Lam, $2,500 from Defendant Don S. Anderson, $30,000 from Defendant John T. Demonaco and $37,500 from Defendant Brian Mayhew in punitive damages.

7. Plaintiff Dana Bowler shall recover from Defendants City of Westminster, Charles V. Smith, Craig Schweisinger, Tony Lam, Don S. Anderson, John T. Demonaco and Brian Mayhew for violation of his First Amendment and equal protection rights, the sum of $43,500 in compensatory damages.

8. Plaintiff Dana Bowler shall recover, the sum of $50,000 from Defendant Charles V. Smith, $10,000 from Defendant Craig Schweisinger, $5,000 from Defendant Tony Lam, $2,500 from Defendant Don S. Anderson, $30,000 from Defendant John T. Demonaco and $37,500 from Defendant Brian Mayhew in punitive damages.

9. Plaintiff Paul Gilbrook shall recover from Defendant Craig Schweisinger for slander per se the sum of $15,000 in compensatory damages and $30,000 in punitive damages, but shall take nothing against defendants on his constitutional claims.

10. Plaintiff Michael Garrison shall take nothing against defendants.

11. Plaintiff Westminster Fire Fighters Association, Local 2425, International Association of Fire Fighters, AFL-CIO, shall take nothing against defendants.

12. Plaintiffs Don Herr, Hal Raphael, Dana Bowler, and Joe Wilson shall take nothing against defendants for slander per se.

13. Plaintiffs shall take nothing from Defendants Charmayne Bohman, Richard Jones, Jerry Kenny and Robert Huntley.

14. Prevailing parties shall recover court costs, as provided by law.

15. Any claim for attorney's fees pursuant to 42 U.S.C. section 1988 shall be made by separate motion which shall be filed within 60 days of entry of this judgment.

Dated: November 20, 1995

/s/ Richard A. Paez
Richard A. Paez
United States District Judge

Supreme Court, U.S.
FILED
OCT 15 1999
OFFICE OF THE CLERK

No. 99-465

In The

Supreme Court of the United States

CITY OF WESTMINSTER, CHARLES V. SMITH, CRAIG SCHWEISINGER TONY LAM, DON S. ANDERSON, JOHN T. DEMONACO, BRIAN MAYHEW, ROBERT HUNTLEY, CHARMAYNE BOHMAN AND RICHARD JONES,

Petitioners,

v.

DON HERR, JOE WILSON and MICHAEL GARRISON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. INTRODUCTION

This case arises out of the constitutional civil rights claims of six individual firefighters, including respondents, against the City of Westminster, and ten individual city officials, including petitioners. After two years of intense political fighting and controversy, in 1994, petitioners fired the firefighters in retaliation for the firefighters having exercised their First Amendment rights to engage in political activities and speak freely. One respondent, Michael Garrison ("Garrison") was fired because after someone died in a fire, he issued a press release critical of the Mayor and City Council for cutting the Fire Department's (the "Department") budget. Although the facts varied with respect to the circumstances surrounding the terminations of the other five firefighters, essentially petitioners based their actions on the pretext that the firefighters had violated a Fire Department ("Department") personnel policy.

After a jury trial on these claims and post-trial motions, the pertinent aspects of the judgment entered by the district court were the following: 1) judgment was entered for respondents Don Herr ("Herr") and Joe Wilson ("Wilson") on their First Amendment claims and on their related conspiracy claims; 2) judgment was entered for petitioners on respondent Garrison's First Amendment claim; and 3) Herr and Wilson were awarded reasonable attorneys fees. On appeal, the Ninth Circuit affirmed the verdicts for Herr and Wilson, and reversed and remanded for a new trial of Garrison's First Amendment claim.

This is a fact intensive case. The issues of law raised herein are neither novel nor areas of conflict among the circuits. In reaching its decision, the Ninth Circuit applied well established case law to the facts.

II. FACTS MATERIAL TO THE QUESTIONS PRESENTED.[1]

A. In 1992, City Officials Threatened Firefighters With Political Retribution.

The firefighters who were plaintiffs in this action were veteran firefighters, leaders in the Department, and active in the Westminster Firefighters' Association (the "union.") The union had been active in local politics for close to 20 years. Its members walked precincts and did other work in support of the candidates it endorsed.

Garrison was an 18 year veteran of the Department. He had served as Captain, paramedic, and training officer. He was also a leader in the union and in 1992, he served as both its public information officer and Chairman of the labor negotiations committee. He also worked as the campaign office manager in the elections in which the union participated. Both Herr and Wilson were 20 year veterans of the Department. Herr served as acting

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[1] Respondents hereby incorporate by reference the Statement of Facts in the decision below, *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999), *amended*, 99 Cal.Daily Op. Service 5641, 99 D.A.R. 7229, 1999 U.S. App. Lexis 15947. However, pursuant to Supreme Court Rule 15.2, respondents will address misstatements and omissions in petitioners' statement of the case in the Petition.

Chief and was a Battalion Chief; Wilson was a Captain. Both were active in the union's political activities.

In the summer of 1992, Garrison and union president Paul Gilbrook ("Gilbrook") met with petitioners Charles V. Smith ("Smith"), then Mayor, and Craig Schweisinger ("Schweisinger"), a member of the City Council, to discuss why the union was encountering problems in its negotiations with the City of Westminster ("City") regarding the union's expiring labor contracts. When the discussion reached the issue of staffing of the fire stations, an upset Smith said, "If you make this a political issue in my upcoming election, I'll have your ass" and walked out. A few weeks later, Garrison and Gilbrook were told by Schweisinger, "Chuck [Smith] is anti-fire now. You people supported your [sic] – you're going to support Joy Neugebauer [for Mayor.] We have problems here with this contract."

This political feud was the genesis of the petitioners' conflict with respondent firefighters, and it was the reason petitioners sought to retaliate against respondents for their First Amendment activity. Petitioners' statement of the case omits mention of these events and attributes the antagonism between the city officials and firefighters to a later budget battle. However, the record establishes that the budget battle, in fact, stemmed also from the political feud. As Schweisinger told Herr in mid-1993, after Smith was re-elected Mayor and recommendations for cuts in the Department's budget were first made public, "It's political retribution pure and simple."

B. Despite Citizen And Department Opposition, In July 1993, The City Lays Off Firefighters And Eliminates A Fire Truck From Service.

Budget and other recommendations about the Department by the Financial Review Committee, a committee of citizens appointed by the City Council, were considered and acted upon in July, 1993, by the City Council They included drastic cuts in fire services, measures to reduce overtime, the removal of a fire truck from service, the layoff of 10 firefighters and curtailment of the political activities of the firefighters. In the event that the firefighters failed to curb their political activities, the committee urged that fire services be contracted out and the Department be barred from bidding to provide those services.

These proposals were quite controversial and were met with vocal and public opposition. The union made a video to educate the public about the issues and circulated a petition to reflect citizen opposition to the cuts. The firefighters collected 14,000 signatures in four days and presented the petition to the City Council. Commenting to a citizen who worked on the petition, Schweisinger again said the cuts were being imposed because "Chuck [Smith] is anti-fire and this is all being done as political retribution." In the end, six firefighters were laid off and one truck was removed from service.

In the course of this highly public debate, the intensity of the rhetoric escalated. In response to the reorganization, the firefighters' union filed suit in state court to reverse the layoffs and cutbacks. The court restored the laid off firefighters to their positions, but the City would

not comply for several months and paid firefighters to stay home, despite the court order. The truck remained out of service. Also in the summer of 1993, the city hired John Demonaco ("Demonaco") to serve as the new Fire Chief.

C. The Candlewood Fire Leads To Garrison's Suspension.

1. The Fire Claims A Child's Life.

On January 28, 1994, there was a fire in Westminster on Candlewood Street. The fire call was responded to by Station 2, with its post-reorganization single engine, and by a Fountain Valley fire truck and medic unit. Firefighter Hal Raphael ("Raphael") was the Battalion Chief on the scene and in charge of the fire. Shortly after he arrived, he was told by on-lookers that there were children in the house. A few minutes later, he learned that a dead child had been discovered face down in a bathtub on the first floor.

Later that night, Raphael called Garrison, the union's public information officer, to tell him about the fire and the fatality. The next morning when Raphael got off his shift at seven a.m., Garrison was at the station. Raphael told him he "felt bad because I felt my hands was (sic) tied because I didn't have the equipment and the people to do the job." Before calling Garrison the night before, Raphael had reviewed the response times of the trucks; Fountain Valley firefighters arrived two and one-half minutes after the Westminster engine did. Raphael felt that the loss of equipment and manpower for those two

and one-half minutes might have made the difference between life and death for the victim.

2. The Press Release.

The morning after the fire, Garrison also talked to Benedetti, the first-in captain, and two other firefighters, Blain and Joseph, who had been inside the house fighting the fire. He then met with the union's executive board and they decided to issue a press release. The press release said, "This tragedy is the direct result of the Mayor and Council placing politics above the safety of the people." Garrison testified that they issued the release to alert the community to the threat to public safety because the Department's equipment and manpower had been cut. Shortly after his statement about the fire, Garrison was suspended on paid leave for issuing the release.

D. Firing Of Garrison, Herr And Wilson.

Two and a half months after his suspension, Garrison received a Notice of Intent to Terminate, dated April 14, 1994. The grounds for his termination were that his statement to the press went "beyond appropriate 'public comment' and constitutional protections. . . . ," as well as that he had failed to comply with a City policy requiring documentation of various types of leave. He received his termination notice one month later. In August, 1994, City Manager Robert Huntley ("Huntley") denied Garrison's last grievance appeal.

Also in April, 1994, Demonaco issued Notices of Intent to terminate Herr and Wilson, allegedly based in

whole, or in part, on their alleged failure to comply with the same City personnel policy.[2] Juxtaposed to other firefighters, Herr's alleged personnel policy violations were comparatively minor. Herr had taken only one day of sick leave and seven vacation days over seven years for which he allegedly had not filed any documentation. The jury ultimately concluded the purported personnel policy violations were a pretext for the illegal firings of Herr and Wilson.

E. Procedural History.

On March 31, 1994, the union, Gilbrook, and Garrison sued the City and various city officials for First Amendment violations based on disciplinary action taken in retaliation for exercising their rights of free speech and association. Later that year Herr, Raphael, Bowler, and Wilson joined as plaintiffs.

The jury trial on the claims of Gilbrook, Garrison, Herr, Raphael, Wilson, Bowler, and the union began on July 25, 1995. At the close of plaintiffs' evidence, defendants moved for judgment as a matter of law. The court granted the motion with respect to Garrison's First Amendment claim. As to the remaining First Amendment claims, the motion was granted for all defendants except Demonaco, Anderson and Huntley who played direct

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[2] Raphael and Dana Bowler, both plaintiffs below, were also fired at this time on similar grounds. Gilbrook had been suspended and then fired in February 1994, in part because of his personnel policy violations.

roles in the disciplinary process; it was denied as to all defendants with respect to the conspiracy claims.

By special verdicts, Herr, Wilson and Bowler prevailed on First Amendment and equal protection claims against Demonaco, Assistant City Manager Don Anderson ("Anderson"), and Huntley. They also prevailed on conspiracy claims in connection with the constitutional rights violations against Demonaco, Anderson, Smith, Schweisinger, Council Member Tony Lam and Finance Director Brian Mayhew. Plaintiffs prevailed on the City's liability. Compensatory and punitive damages were awarded.

On November 21, 1995, defendants moved for judgment as a matter of law and a new trial. On July 17, 1996, the district court ruled on the motions. It denied the motions for judgment notwithstanding the verdict and new trial as to the First Amendment retaliation and conspiracy claims, but granted the motion as to the equal protection claims and also remitted punitive damages awards against three defendants.

Appeal and cross-appeal were timely filed. The Ninth Circuit issued its opinion May 21, 1999. It affirmed the judgments for Herr and Wilson on their First Amendment claims, affirmed the judgment for defendants on the equal protection claims, and reversed and remanded for new trial on Garrison's First Amendment claim. Petitions for re-hearing were denied and the Ninth Circuit issued an amended opinion July 15, 1999.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

III. THE NINTH CIRCUIT'S APPLICATION OF MT. HEALTHY IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION AND THOSE OF OTHER CIRCUITS.

A. In Retaliatory Firings, Where The Actors In A Chain Of Decision Makers Are Not Equally Culpable, Case Law Provides Rules For Causation.

Petitioners challenge the Ninth Circuit's application of this Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct 568 (1977) ("*Mt. Healthy*"). Here, the decisions to terminate respondents from their positions as firefighters were made by Demonaco and Assistant City Manager Anderson. Appeal was made to Huntley. The jury found that protected conduct was a "substantial or motivating" factor in the decisions of Demonaco and Anderson, but that it was not in Huntley's decision. Finding that the discipline was pretextual and that the exercise of constitutional rights was "a motivating or substantial factor behind defendants' decision" to discipline petitioners, the trial court judgment affirmed the jury's award of damages to Herr and Wilson.

Petitioners argued erroneously on appeal, and in the Petition for Writ of Certiorari (the "Petition") that the jury's failure to find Huntley substantially motivated by respondents' exercise of their First Amendment rights was equivalent to a finding of independent and innocent motives on his part. Further, they contend that Huntley's

'legitimate' motives trumped any unlawful motives present earlier in the process. Respondents do not agree, nor did the trial court or the Ninth Circuit.

The Ninth Circuit's resolution of the issue is found in its application of the *Mt. Healthy* holding to the specific facts of this case, with citation to analogous cases in other circuits. *Gilbrook v. City of Westminster*, Appendix to Petition ("App.") at 18-22. In a retaliatory firing case where mixed motives are shown, once the employee has established that his discipline was "substantially" motivated by his constitutionally protected conduct, the burden shifts to the employer to prove that it would have imposed the same discipline even in the absence of the protected conduct. *Mt. Healthy, supra* 429 U.S. at 287. The Ninth Circuit wrote, "The First Amendment . . . 'is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.' " App. at 19, quoting *Mt. Healthy, supra* 429 U.S. at 285-86.

The Ninth Circuit determined that the requisite causation under *Mt. Healthy* is not automatically lost because of the presence of a so-called 'innocent decision-maker.' App. at 20. The court must engage in an "intensely factual" inquiry in order to resolve the causation question. App. at 23. Where a series of acts is set in motion due to impermissible retaliatory motivation, and the 'innocent decision-maker' relies upon, or is influenced by, the initial acts or reasoning of the wrongdoer(s), sufficient causation exists. App. at 21.

The test applied by the court was to ask whether the 'innocent' decision-maker, Huntley, would have imposed

discipline in the absence of the charges brought by Demonaco and rubber stamped by Anderson. App. at 24. Facts in the record supported the determination that Huntley's actions were based upon Demonaco and Anderson's recommendations. For example, Huntley's "hearings" lasted no more than two to five minutes, by his own admission, and his decisions were based upon review of the materials prepared by Demonaco and Anderson. The Ninth Circuit concluded that the jury's verdict reflected its conclusion that Huntley would not have brought charges on his own, and therefore the result in the case was consistent with *Mt. Healthy*. *Id.*

B. Case Law Supports The Ninth Circuit's Decision; Petitioners' Cases Are Not On Point.

The Ninth Circuit discussed analogous retaliatory discharge cases in other circuits. In *Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 266 (5th Cir. 1984), the court determined that although the Board of Trustees did not dismiss the plaintiff in retaliation for his protected conduct, but for the events set in motion by the wrongdoing college president, they would not have considered dismissal at all. Accordingly, the court affirmed a jury's award of damages against the college president. *Id.* at 267. In *Saye v. St. Vrain Valley School District*, 785 F.2d 862, 867-68 (10th Cir. 1986), even though the school board voting not to renew plaintiff's contract was not aware of her union activity, the court held that the plaintiff's discharge nevertheless could have been found to be in retaliation for her union activities. This was because the

evidence showed that the board relied on the recommendation of defendants whose motive was retaliatory. Thus, the court reversed the directed verdict for defendants and remanded for a new trial. *Id.* Finally, in *Hickman v. Valley Local School District Board of Education*, 619 F.2d 606, 610 (6th Cir. 1980), the court found a sufficient causal link where the majority of the decision-making board relied on recommendations of a defendant who acted out of constitutionally impermissible motives.

Also consistent with these cases is *Ware v. Unified School District No. 492*, 881 F.2d 906, 913 (10th Cir. 1989.) In that case, the secretary to a school district superintendent took a political position adverse to that of the superintendent on a pending bond issue. After the election on the bond issue, the superintendent recommended to the school board that the plaintiff not be hired again, citing as reasons subjective factors which, upon analysis, all stemmed from their political clash. The plaintiff was fired and she filed suit alleging retaliatory firing. The district court granted a directed verdict for the school board and a judgment notwithstanding the verdict ("jnov") for the superintendent. The appellate court reversed the judgment as to both, finding that the evidence was sufficient to support a conclusion that either the board delegated its decision to the superintendent, or acted in disregard of the plaintiff's First Amendment rights. *Id.*

In reversing the jnov, the appellate court concluded that the district court "clearly substituted its judgment for that of the jury." *Id.* at 911. It noted that "jury verdicts are not to be lightly overturned. . . . " *Id.* The same could be remarked of petitioners' efforts herein. The jury's verdict of liability for retaliatory firing was amply supported

by substantial evidence and consistent with well-established law. As such, there was no reason to disturb it on appeal.

Petitioners do not offer *any* authority which conflicts with the above cited cases. The cases which are cited in the Petition were all cited below and are inapposite. These cases share the common characteristics that they are employment discrimination cases and they turn on the absence of a material element of causation, not on the issue of an intervening "innocent" decision-maker. In *DeHorney v. Bank of American National Trust & Savings Association*, 879 F.2d 459, 468 (9th Cir. 1989), the court affirmed summary judgment for the defendant, where the plaintiff, DeHorney, failed to meet her initial burden and establish that she was fired for reasons of race. Additionally there was "some confusion" about who actually made the decision to terminate her. *Id.* Neither circumstance was present herein.

In *North v. Madison Areas Association For Retarded Citizens-Developmental Centers Corp.*, 844 F.2d 401 (7th Cir. 1988) ("*MAARC*"), the plaintiff who sued his employer under Title VII "failed to demonstrate that the Board's proffered reasons for eliminating North's position were pretextual, or that race was a motivating or substantial factor behind that decision." *Id.* at 408. Unlike in *MAARC*, the jury here did find that exercise of First Amendment rights was a substantial factor in the decisions to fire plaintiffs and that the personnel policy violations were pretext. Similarly, in *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 548 (7th Cir. 1997), there was *no* evidence that the person who actually fired the plaintiff did so for reasons of racial bias.

Only in *Long v. Eastfield College*, 88 F.3d 300, 307-308 (5th Cir. 1996), do petitioners come anywhere close to the issue at hand. There, the court reversed summary judgment on the ground that there were triable issues of fact as to whether the actual decision-maker had performed an independent investigation or was just a "rubber stamp" for his subordinates' retaliatory recommendation to fire the plaintiff. However, the instant case was not in that procedural posture. Here, the jury reached its conclusions as trier of fact, having heard the evidence and assessed the witness' credibility. It decided that in the absence of the respondents' protected conduct, they would not have been disciplined, regardless of Huntley's motivation. Petitioners essentially are seeking another crack at overturning the jury's verdict on the facts in this case, which is not a suitable basis for United States Supreme Court review.

Long also points to the key observation made by the Ninth Circuit – "the *Mt. Healthy* mixed-motive inquiry is an intensely factual one, the results of which will vary depending on the circumstances." App. at 23. The petitioners give the decision an unfounded alarmist reading, that because of it "legitimate grounds for discipline are ultimately irrelevant." Petition at 12. Contrary to the petitioners' interpretation, the Ninth Circuit emphasized that "if the facts showed that the final decision-maker made a wholly independent, legitimate decision to discharge the plaintiff, uninfluenced by the retaliatory motives of a subordinate," it would not necessarily have reached the conclusion it did herein. App. at 23-24.

In sum, respondents have failed to demonstrate that the Ninth Circuit's decision in the instant case conflicts

with any decision of this Court or with any decisions in other circuits. The federal question, the requisite causation required in a mixed-motive case of retaliatory firing under the First Amendment, was resolved in a manner entirely consistent with the controlling case on the question, *Mt. Healthy*. The Ninth Circuit simply applied the rule and rationale of *Mt. Healthy* to the facts of this case consistent with the approach of numerous other circuits. Each of the other circuits applied the same principle, that the requisite causation could be found in a chain of events which would not have resulted in injury to the plaintiff in the absence of an impermissible retaliatory motive. There is no reason for this Court to grant certiorari on the First Amendment issue presented by this case.

IV. THE DECISION TO REVERSE THE DIRECTED VERDICT FOR PETITIONERS ON GARRISON'S FIRST AMENDMENT CLAIM SIMPLY INVOLVED APPLICATION OF *PICKERING* TO THE FACTS OF THE CASE; IT PRESENTS NO ISSUE FOR THIS COURT.

A few months after the City Council enacted the controversial cutbacks in the Department, there was a fire in the area served by the station which had a truck taken out of service. A child was killed in the fire. Based on what he learned from witnesses and saw himself at the scene of the fire, Raphael, the Battalion Chief in charge at the fire, concluded that the loss of the second truck probably contributed to the firefighters' inability to save the child. Raphael called Garrison to inform him of the death, and early the next day, Garrison interviewed other

firefighters who had actually been in the burning house. Then he convened a meeting of the union's Executive Committee to consider what action, if any, to take. They decided to issue a press release which stated, "This tragedy is the direct result of the Mayor and Council placing politics above the safety of the people." Explaining the decision to issue the release, Garrison testified, "I made a statement because we had a death. A death we felt could be prevented. . . . And there was a position of public safety, and we were trying to bring that out into the community."

At the time of the Candlewood fire, the adequacy of the Department's budget to insure the public's safety had been the subject of debates and citizen protests throughout the City for more than a year. The press release was part of that on-going debate and it concerned a public safety issue about which citizens were obviously quite concerned. The Ninth Circuit agreed with respondents that the release clearly involved a matter of public concern. App. at 50. *See Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed. 2d 708 (1983).

Respondents also cited below several other cases involving similar or analogous facts which had been found to be matters of public concern. *See Burgess v. Pierce County*, 918 F.2d 104, 105-06 (9th Cir. 1990) (Fire Marshall's statements that ordinances conflicted with state fire safety standards held, without elaboration, to be matters of public concern); *Roth v. Veteran's Admin. of U.S.*, 856 F.2d 1401, 1406 (9th Cir. 1988) (Doctor's speech criticizing administrator's use of resources, mismanagement, and safety violations held protected by First Amendment); *Firefighters Assn. District of Columbia v. Barry*, 742

F.Supp. 1182 (D.C.C. 1990) (Firefighter's statements at press conference about effectiveness of equipment held to be "obviously" matter of public concern.)

Having determined the press release involved a matter of public concern, the Ninth Circuit conducted the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) ("*Pickering*"), weighing "the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." First Amendment protection will not be accorded to statements by public employees unless their free speech interests clearly outweigh their employer's interest in avoiding material disruption. This, like the *Mt. Healthy* analysis, is a fact sensitive inquiry. Based upon the facts in the record, the Ninth Circuit considered a number of different factors and concluded that Garrison's interest in speaking out was greater than the risk of potential disruption. App. at 54-55.

Even so, petitioners urge that the Ninth Circuit erred in not finding that they were protected by qualified immunity. Petitioners' view is that because *Pickering* involves a "multi-factor" balancing test, it "all but compels qualified immunity for officials who turn out to be wrong about what the law requires." Petition at 19. However, the Ninth Circuit held that petitioners were not entitled to qualified immunity because "the *Pickering* balancing test so clearly weighs in favor of Garrison that it was patently unreasonable for defendants to conclude that the First Amendment did not protect his speech." App. at 60.

In support of their position, petitioners quoted from a number of decisions in which defendants are granted qualified immunity from prosecution for violation of plaintiff's constitutional rights. Petition at 19-20. The language petitioners quote is similar from case to case and amounts essentially to a boilerplate comment from the courts concerning the difficulty of finding a "clearly established right" in a fact-intensive inquiry which requires balancing of competing interests. For example, from *Moran v. State of Washington*, 147 F.3d 839, 847 (9th Cir. 1998) ("*Moran*"), petitioners quote language stating that because the *Pickering* test is so fact-sensitive, the law regarding First Amendment claims "will rarely, if ever," be sufficiently 'clearly established' to preclude qualified immunity. Petition at 20. However, even the *Moran* decision recognized that "there will be the occasional case in which existing case law is so closely on point that the law relating to a public-employee-speech claim might be said to be clearly established." *Id.* at 847 n.5. Further, the court there declined to endorse a "per se" rule, which is essentially the position petitioners take herein. *Id.*

The Ninth Circuit's decision in *Gilbrook* is entirely consistent with *Moran* in that it is a fact-driven conclusion that Garrison's First Amendment protection for his press release should have been obvious to petitioners. This case, given the weight of public interest in being informed about the adequacy of public safety services, is precisely that "occasional case" referred to in *Moran*.

Further, numerous other courts apply the *Pickering* analysis and nevertheless are able to discern situations in which qualified immunity is not warranted, even where, as here, the defendants offer numerous arguments as to

why it was unclear that the plaintiff's First Amendment rights have been violated. Indeed, virtually all defendants argue that their difficulty in discerning a "clearly established right" should entitle them to qualified immunity. *See Paradis and Ryan v. Montrose Mem. Hosp., County of Montrose*, 157 F.3d 815, 819 (10th Cir. 1998) (Court affirms denial of qualified immunity where two nurses were constructively discharged in retaliation for speaking out about administrator's illegal and unethical conduct.); *Chappel v. Montgomery County Fire Protection Dist. No. 1*, 131 F.3d 564, 579-80 (6th Cir. 1997) (Court affirms denial of qualified immunity for defendants who took a series of retaliatory actions against plaintiff who spoke out about inadequacies and irregularities in management of city's ambulance service; "The number of defendants' arguments and the length of our responses, however, should not be taken as an indication that the defendants have pressed a colorable defense"); *Walker v. Schwalbe*, 112 F.3d 1127, 1133 (11th Cir. 1997), *cert. denied*, 1998 U.S. Lexis 3107 (Court affirmed denial of qualified immunity to defendants who demoted plaintiff for speaking to legislators about budget concerns and possible improprieties); *Marshall v. Allen*, 984 F.2d 787, 795-97 (7th Cir. 1993) (Court affirmed denial of qualified immunity to defendants who fired plaintiff for speaking out in favor of four women colleagues in Housing Authority who complained of unequal pay and working conditions.)

The Ninth Circuit carefully addressed each of petitioners' arguments in support of their position that Garrison's First Amendment right to speak out was not clearly established and refuted their application to the instant

case, as was done in each of the cases cited above from sister circuits. Further, as the Eleventh Circuit stated,

> "When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar." *Walker, supra* 112 F.3d at 1132 (citation omitted.)

Because there were several extremely similar precedents and because it found the particular facts at hand to be so compellingly demonstrative of the context in which a public employee's speech must be protected, the Ninth Circuit found the presumptions in favor of qualified immunity were overcome. This case is a straightforward, correct application of *Pickering*. Under such circumstances, there is no reason for the Supreme Court to hear this case.

V. ADMISSION OF EVIDENCE ABOUT DAMAGES FROM CONSPIRATORS' VIOLATION OF RESPONDENTS' FIRST AMENDMENT RIGHTS WAS WELL WITHIN THE TRIAL COURT'S DISCRETION.

It was undisputed below that respondents suffered emotional distress from the date they were presented with notification of discipline until the present. Petitioners challenged the introduction of evidence regarding emotional distress suffered *prior* to the discipline as irrelevant and prejudicial. However, the jury not only found petitioners Anderson and Demonaco liable to plaintiffs for retaliatory discipline, but it also found that they and

the four other petitioners had conspired to retaliate against respondents because of the firefighters' political activity.

In an action arising under 42 U.S.C. § 1983, damages are awarded to compensate for injuries caused by the deprivation of constitutional rights. *Carey v. Piphus*, 435 U.S. 247, 254, 98 S. Ct. 1042, 1047, 55 L. Ed. 2d 252 (1978). In determining how to compensate plaintiffs, the jury was entitled to consider all relevant evidence regarding plaintiffs' injuries suffered as a proximate result of both the discipline and the conspiracy to violate their rights. Respondents clearly suffered emotional distress from the acts of the conspiracy. Petitioners' actions unfolded over two years with threats to firefighters' jobs and their right to speak freely, and finally culminated in discipline. The evidence of emotional distress stemming from these activities was relevant to prove plaintiffs' damages.

Moreover, this evidence was not prejudicial because the non-economic damages were not excessive. In civil rights cases, the jury's damage award verdict is entitled to more weight than in ordinary cases, because of inherent difficulty in giving such rights a dollar value. *Collum v. Butler*, 288 F.Supp. 918 (D.C. Ill. 1968), *aff'd*, 421 F.2d 1257 (7th Cir. 1970). Yet, by any measure, the non-economic damages awarded here were not excessive. The awards made by the jury would have been reasonable and clearly supported by the evidence, even if they were to compensate only for the emotional distress suffered after the discipline. *See, e.g., Sykes v. McDowell*, 786 F.2d 1098 (11th Cir. 1986), *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989), *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988). Petitioners are trying to elevate their dispute

with the court's discretionary and harmless admission of evidence to the level of a constitutional issue. Petitioners' arguments are inflating this issue beyond its true dimensions. It is not a matter for review by our highest court.

CONCLUSION

For all of the reasons outlined above, respondents request that this Court deny the Petition for Writ of Certiorari.

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Respectfully submitted,

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